



THE INDIAN LAW REPORTS, BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT.

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Page 335, headnote line 5 from bottom, *for* "Schedule II " *read* "Schedule I.

Page 337, line 13 from bottom, *for* "second schedule" *read* "first schedule."

Page 638, line 4 from bottom, *for* "1827. Preamble" *read* "1827; preamble."

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THE
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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

CHHOGMAL BALKISSONDAS, A FIRM (ORIGINAL PLAINTIFFS), APPELLANTS, *v.*
JAINARAYAN KANAIYALAL (ORIGINAL DEFENDANT) RESPONDENT.*

1913.
December 18

*Pakki adat transactions—Wager, intention to, not negatived—Pakka adatia,
position of qua client—Transactions by Munim—Costs.*

The existence of the *pakki adat* relationship does not of itself negative the existence of an understanding between the *adatia* and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered.

Qua the client the *pakka adatia* is a principal and not a disinterested middleman bringing two principals together. The question which has to be decided is what on the evidence was the common intention of the parties with regard to the settlement or completion of the transactions in dispute.

A defendant who has successfully pleaded a lawful defence is entitled to his costs.

Burjorji Ruttonji v. Bhagwandas Parashram⁽¹⁾, followed.

THE plaintiffs were a firm of Marwari merchants carrying on business at Bombay and elsewhere in India. The defendant was the owner of a firm carrying on business at Cawnpore through his Munim, Mangalchand.

In the year 1908-09 the defendant's firm employed the plaintiffs to act as their *pakka adatias* and to

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honour their hundies in Bombay on certain terms as to commission and brokerage usual in *pakki adat* transactions. The account between the parties was made up and adjusted up to the 7th of July 1910. Thereafter the plaintiffs accepted further orders from the defendant's said firm for the purchase of cotton, seeds, etc., and paid hundies drawn on the plaintiffs by the said firm.

It appeared that in the case of none of these transactions was delivery given or taken and though in one or two instances delivery orders had been given by the plaintiffs, in every such instance there were cross entries in respect of such delivery order.

On the 1st of April 1911 the defendant's said firm wrote asking for accounts and for particulars of transactions outstanding. The plaintiffs thereon sent the accounts asked for showing outstanding sales of 800 tons linseed and 200 tons rapeseed and asked the said firm to arrange for taking delivery and to protect the plaintiffs from liability entered in respect of the said transactions and claimed Rs. 12,209-7-9 from the defendant's said firm. On the 5th of May 1911 the said firm wrote denying that they could find any trace of the said transactions in rapeseed and linseed in their books and alleging that their Munim had no authority to enter into such transactions and denying liability thereon.

The plaintiffs were forced to purchase in the market to meet the contracts they had entered into as a result of the defendant's firm's orders, and as a result claimed Rs. 48,045-15-0 as due on the account between the parties.

The defendant (*inter alia*) alleged that the business of his firm consisted only of hundi transactions and the purchase and sale of ready goods and denied that his Munim had authority to enter into forward contracts. The defendant disputed the statement that the plaintiffs

had acted as *pakka adatias* and contended that all the orders given by his Munim were merely in respect of wagering and gambling transactions.

The suit was tried in the first instance before Mr. Justice Macleod who held that Mangalchand had not exceeded his apparent authority and that the defendant was liable to the plaintiffs unless liability could be evaded on the ground that the transactions were by way gaming and wagering.

After considering the course of dealings between the parties and the position in law of a *pakka adatia* in relation to his client the learned Judge held that no circumstance proved before him could lead him to suppose that the parties had any intention of doing more than gamble on the rise and fall of prices in silver, cotton, etc., the whole of the evidence being in favour of a common understanding that the parties should deal in differences and should settle in that way. The learned Judge accordingly decided in favour of the defendant but did not award him his costs.

The plaintiffs thereon appealed. The defendant also filed cross-objections to the judgment of Mr. Justice Macleod more especially in so far as costs were not awarded to him thereby.

Raikes, with him *Strangman* (Advocate-General), and *Jinnah*, for the appellants.

Setalwad, with *Moos*, for the respondent.

C. A. V.

SCOTT, C. J.:—This is an appeal from a decree of Mr. Justice Macleod dismissing a suit brought by the plaintiffs, who carry on business as Shroffs, *pakka adatias* and commission agents in Bombay, to recover Rs. 48,045-15-0 as a balance of account payable by the defendant on transactions in which the plaintiffs acted as

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the defendant's *pakka adatias*. The balance appearing against the defendant is attributable to losses on forward contracts for the sale or purchase of silver, Bengal cotton, Broach cotton and linseed. All these losses occurred on contracts under which in fact no delivery was given or taken and all the contracts were entered into with the plaintiffs by Mangalchand, the Munim of the defendant's Cawnpore branch. The defendant disputes the authority of Mangalchand to enter into forward contracts on his behalf and upon this contention arises the first point in the appeal.

Mangalchand was the sole Munim of the defendant at Cawnpore from 1897 to 1911, his remuneration being a share of six annas in the profits of the Cawnpore business.

There is no doubt that it is common for Marwari firms in the mofussil and their Marwari *adatias* in Bombay to enter into forward contracts for the purchase or sale of silver, cotton and seeds. The evidence of Jwaladas shows that the defendant's Cawnpore books record forward transactions of this description in 1958 (1900-01), 1959 (1901-02), 1962 (1905-06) and 1964 (1907-08). The books for 1961 and 1963 were not forthcoming at the time of Jwaladas' investigation and they have not been produced in this Court. The evidence establishes that the defendant visited Cawnpore from time to time but never himself examined the books. Business relations between the plaintiffs and the defendant's Cawnpore branch went on from 1901 to 1911 and it is not disputed that an adjustment arrived at in 1908, when Rs. 81 was found due to the defendant, embraced accounts of forward transactions entered into by Mangalchand in the name of the defendant. It is, however, the fact that between 1908 and 1910 the transactions between the plaintiffs and the defendant's Cawnpore firm related solely to hundies and that of the

forward transactions entered into in 1910 and 1911 no trace is to be found in the defendant's Cawnpore books. It is probable that Mangalchand did not wish the defendant to know of the forward contracts he was entering into during that period with the plaintiffs but it is not contended that the latter received any intimation that Mangalchand's apparent authority to enter into forward contracts had ever been revoked. On the 1st of April 1911 the defendant writes to the plaintiffs: "After having copied our account up to this day please write up information about any goods which may have been bought and sold through you." This information was supplied at once but it is not till after the 22nd of April when the plaintiffs' solicitors wrote that at least Rs. 40,000 would be required as margin on the forward transactions that the defendant by his pleader's letter of the 5th May informed the plaintiffs' solicitors that Mangalchand had no authority to enter into forward transactions.

The learned Judge was therefore right in holding the transactions in suit were within the apparent authority of Mangalchand and we agree with him in thinking that if the transactions had resulted in a profit to the defendant the defence that Mangalchand had exceeded his authority would not have been put forward.

The defendant has, however, a second line of defence based on section 30 of the Contract Act on which he has succeeded in the lower Court. He pleads that all the orders given to the plaintiffs by Mangalchand to enter into forward transactions were in respect of wagering and gambling transactions and were entered into by the plaintiffs on that understanding. He also denies that the plaintiffs acted as *pakka adatias*. The denial on the one side and the assertion on the other of the plaintiffs' employment as *pakka adatias* were probably made with a view to support the respective cases of

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wager and no wager but for the reasons given by this Court in *Burjorji Ruttonji v. Bhagwandas Parashram*⁽¹⁾ we are of opinion that the existence of the *pakki adat* relationship does not of itself negative the existence of an understanding between the *adatia* and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered.

The plaintiffs' accounts show that the defendant was charged the usual *pakki adat* commission of six annas and four annas for brokerage. The plaintiffs' journal entries which have been put in, namely Exhibits 25 and 32, relating to the 1,000 tons of linseed and the 200 tons of rapeseed for the April-May Vaida of 1911, show that the plaintiffs regarded the transactions as being on the defendant's *gharu* or private account while the Soda Vahi entry (Exhibit 19) shows that of 300 bales of Broach cotton sold on the defendant's account for the Vaida of March 1911 two hundred were taken by the plaintiffs on their own private account. The plaintiffs' Gumasta Ramkisson deposes that the 800 bales of Broach cotton for the March Vaida on which the defendant is debited with a loss of Rs. 13,225 was part of 2,600 bales bought and sold by the plaintiffs for the March Vaida of which a considerable proportion was taken on plaintiffs' *gharu* or private account.

This is all consistent with the plaintiffs' contention that they were *pakka adatias* of the defendant transacting business upon the terms of the Bombay custom described in *Bhagwandas v. Kanji*⁽²⁾ but it follows that *qua* the defendant they were principals and not disinterested middlemen bringing two principals together. The question then, which we have to decide is what on the evidence was the common intention of the parties with regard to the settlement or completion

(1) (1913) 38 Bom. 204.

(2) (1905) 30 Bom. 205.

of the transactions referred to in the account annexed to the plaint.

The evidence of Mangalchand as to the manner in which these transactions were carried out is as follows :—

“ Such transactions were made in this way. The rates were out some twelve months prior to the due date: then the Bombay and Calcutta people used to inform their customers about the rates of different commodities: whoever found the rate to become cheap in future would sell and whoever considered the rate to become high in future would purchase. If at any time after this Soda before the due date the purchaser found the transaction profitable he would resell by a telegram, otherwise on the due date the losses and profits used to be settled according to the rates. No delivery used to be given or taken on the due dates by the seller or purchaser respectively. As long as I dealt in such transactions I neither gave nor took any delivery of anything sold or purchased. There takes place no delivery at Bombay and so I never contemplated to take or give delivery of goods. Chhogmal Balkrishna's shop is at Bombay. I made Satta transactions with the said firm and once or twice I sent ready goods also for sale. I made the same kind of Satta transactions with Chhogmal Balkrishna as I have mentioned above to have made with Madon and other *adattas* of Bombay. In this case too no deliveries were contemplated or made.”

The evidence of Ramkisson, the plaintiffs' Gumasta, strongly supports the defendant's contention that under the forward contracts in question no deliveries were contemplated. That the contracts in respect of 60 chests of silver were purely by way of wager was admitted by plaintiffs' counsel before Ramkisson's cross-examination had begun. These contracts were made upon an order from defendant by wire on the 23rd July 1910 to sell 60 silver and on the 7th October 1910 to buy 50 silver. The contracts for all the other commodities were effected by wire in the same way. The wire of the 7th October 1910 relating both to silver and to Bengal cotton may be quoted as an example. “ Sell 50 silver Aso and 22 January; reply.” The telegrams include orders for sale and purchase of 800 bales of Broach cotton, a commodity not produced in the

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Cawnpore District. Besides these 6,000 more bales of this cotton were bought or sold by the plaintiffs for the Vaida of March 1911 but no delivery was given or taken.

Coming now to commodities produced in the district in which Cawnpore is situate, the defendant gave telegraphic instructions to the plaintiffs to sell 200 bales of Bengal cotton on the 7th October 1910 for the January Vaida and on the 24th of January 1911 to sell the same amount for that Vaida. The plaintiffs in fact received no Bengal cotton from any constituents in 1966-67 or 1967-68 but they contracted for the sale or purchase of 2,700 bales upon which differences were paid or received.

Taking next linseed, another commodity produced in the Cawnpore District, the defendant gave instructions for the sale and purchase of 300 tons for the September Vaida. The transaction was settled by striking differences. The plaintiffs' linseed transactions for that Vaida were for 425 tons all of which were settled by payment of differences.

For the May Vaida the defendant instructed the plaintiffs by telegram to buy 1,000 tons of linseed in all and to sell 200 but none was delivered or received. For that Vaida the plaintiffs' linseed transactions amounted to 3,850 tons but there were no deliveries except 25 tons to a Bombay Marwari named Sadashiv Gambirchand some time after the defendant's repudiation of liability.

The mode in which the plaintiffs executed the defendant's orders was that employed in executing the orders of all other Marwari constituents on forward contracts. They took for themselves on *gharu* or personal account such orders as they wished to reserve and passed on the others to other Bombay Marwaris through brokers (the *modus operandi* is well illustrated by the learned Judge in his detailed account of the defendant's linseed

contracts for the September Vaida). These Bombay Marwaris are a small body who, as the evidence of the invariable payment of differences suggests, almost certainly contract with a thorough understanding that no deliveries shall be called for or given. They only number 20 out of the plaintiffs' 300 constituents. The subsidiary contracts or Kabalas are only accepted by the plaintiffs from Marwaris. There is no evidence that any of the Marwaris with whom the plaintiffs deal require produce for export. The plaintiffs' Gumasta admits (1) that in 1966-67 or 1967-68 the plaintiffs did not deliver any Broach cotton for cash; (2) that during those years no constituents sent them Bengal cotton; and (3) that at the May Vaida of 1911 although it might have been profitable to buy ready linseed to fulfil forward contracts this was not done in any case.

The first two of these admissions do not apparently apply to the business of sale on commission of tangible produce; for the plaintiffs' Gumasta says:—

"I can tell you from the books how much cotton, linseed and rapeseed was delivered for the last three years. The quantities delivered will appear in the weighment book. We receive ready goods for sale on commission from our constituents' cotton, linseed and rapeseed. We receive linseed by the bag of two and one-fourth Bengal maunds. We get from 4,000 to 5,000 bags a year. Last year we got 10,000 bales of cotton for sale on commission. We also received rapeseed for sale on commission. The figures will appear in the weighment books."

This business of sale of ready goods is a commission agency business the records of which are kept in a book which has no relation to the Vaida or forward business in which the defendant's losses were incurred.

Much reliance has, however, been placed upon certain letters which passed between the plaintiffs and Mangalchand from which the Court is asked to infer that Mangalchand intended and the plaintiffs expected the linseed contracts for the Vaida of May 1911 to be fulfilled by the

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delivery of linseed. And if this inference were accepted the conclusion would be suggested that the evidence as a whole does not negative the possibility of deliveries under the other forward contracts initiated by Mangalchand, even for other commodities such as Bengal and Broach cotton. In discussing the passages in the correspondence which are relied on it is important to bear in mind that the time for fulfilment of forward linseed contracts for the May Vaida in Bombay is from the 15th to the 31st of May.

On the 3rd of January 1911 (Exhibit 65) the plaintiffs wrote :—

“Orders for many Sodas (transactions) in silver are received from you by other people. No (orders are received) by me. What is the reason thereof? It does not become you to act in this way.”

Mangalchand replied by Exhibit N :—

“You write to say that we do not send to your firm orders (for) business and that we send the same to some other firm. It is all right. We have not sent orders (for business) to anybody. Further, please write and let us know how you came to know that and to whom we have sent orders (for business). (As to) whatever work has been sent in these days the same has all been sent to your firm and not to any other place (*i. e.*, firm). Ready goods have been more or less sent. The same have been sent to Tilokchand Mamraj. Goods used to be sent (to him) even formerly. Now-a-days we do not venture to buy or sell any kind of goods. When we think proper we shall send orders (for business) to you. Please write and let us know when *pukka* information about linseed will be received. Please write about the tendency of silver market. Here rain has fallen all over the four directions. Owing to the fall of rain the crops will be still better. Please note this. The 5th of Pos Sud in (the Samvat year) 1967 (5th January 1911).”

This letter can hardly refer to forward contracts of produce for the defendant had in December given the plaintiffs orders for the forward purchase of 500 bales of Broach cotton and for the forward sale of 400 tons of linseed and 200 tons of rapeseed (see Exhibit F). Mangalchand says that “now-a-days they do not venture to buy or sell any kind of goods,” which might intimate

to the plaintiffs, if intimation were needed, that deliveries need not be expected under the forward contracts. The ready goods sent to Tilokchand Mamraj were 100 tons of poppyseed sent for sale on commission. They were sold to an export firm on railway receipts as soon as it was known the goods were on the way. The request for *pakka* information about linseed was not apparently made for the purpose of the forward contracts for on 7th of January before a reply was received a telegraphic order to sell 200 tons of linseed at 12.3 was sent to the plaintiffs (see Exhibit F).

On the 8th January Mangalchand wrote, Exhibit O, in which, after referring to the forward sale on the previous day of 200 tons of linseed, he says :—

“ We think that all the commodities will fall (in price) after five (or) seven days. The crops in this district are very abundant. On arrival of the goods appertaining to the crops the market will go down considerably. Further, everything is under the control of Thakorji. Shall we send ready goods to you? If you can exert yourself in selling the same, please write (to us). The 8th of Posh Sud of Samvat 1967.”

On the 9th Mangalchand writes (Exhibit P) :—

“ You have written to say that you have sold cotton and linseed. We have brought the same to account as written by you and have already sent a *chithi* (i. e., letter). The same must have reached (you). By what time will the *pakka* report about linseed and that of Indian and American (cotton) come? Please write positively (about the same). With regard to the produce of linseed in India it is conjectured that it will be four times more than that of the last year. Further, it is in the hands of Thakorji. Ready goods will begin to arrive within one month when Bazar will go down positively. The Bazar will surely not be so (brisk).”

On the 20th January the plaintiffs complain (Exhibit 67) :—

“ Further you send orders on Bhai Bhikamchand Balkissondas for many Sodas (transactions) in silver.”

To which Mangalchand replies on the 22nd (Exhibit Q) :—

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"You write that our orders for silver business are received at Bhikamchand Balkisson's. How do you write this way? We have never had any occasion even for correspondence with them, nor are they our commission agents. Further, nobody has in these days orders for silver business from us. If there be any business we shall send the orders to you."

On the 21st January (Exhibit S) the plaintiffs sent an account of transactions for the year 1966 showing Rs. 1,194 due to the defendant.

On the 28th January (Exhibit 68) they wrote :—

"Moneys have not been received from you. Do you be good enough therefore to send the same."

To this demand Mangalchand takes exception in Exhibit T on the 8th February as no moneys were due by him on the account and if money is wanted to meet losses on the Bengal cotton contracts particulars should be sent. He then proceeds as follows :—

"We shall remit the moneys in respect of the loss twenty days before the month in which the due date is to fall. Do you please rest assured. We shall of course send linseed to you. At Jamnapur the produce of linseed is very large. Our man will go to attend to the purchases. Ready linseed will be sent. Please rest satisfied. Further, we have written to the linseed merchants. Those people will send all the goods. Further, please be writing about the tendency (of the market) as to silver. Please send a letter containing full particulars. Please write about business, if any. We shall send to you ready linseed entirely. Further, our instructions for the purchase of lai (*i. e.*, a kind of seed) have been sent to all places. The lai received at present is of inferior quality. Dry goods will be received in ten days' time, when purchases will be commenced, and lai will be sent to your place. Please note that. Please send a letter containing full particulars."

The promise to remit moneys is very vague. It can hardly refer to the loss on the Bengal cotton contracts the Vaida for which had expired. It was apparently intended as a comforting assurance that the defendant would fulfil his engagements. The references to ready linseed have been much relied on by the plaintiffs' counsel as showing an intention to deliver everything that was due on the linseed contracts. At this time,

however, the buyer could not be forced to take delivery under a contract for the May Vaida, nor at any date before the 15th of May. The references to *all* the linseed may be reasonably explained as meaning that all that might be brought in by merchants would be consigned to the plaintiffs "ready", *i. e.*, for sale on commission.

On the 9th February the plaintiffs wrote (Exhibit B in appeal) that the linseed market was entirely upwards (*teji*) and people expected it to go to Rs. 15.

On the 10th February Mangalchand writes (Exhibit V) :—

"We shall send all the linseed ready ; on the arrival of linseed the market will go down considerably."

He seems here to propose to send all the ready linseed available in order to depress the market which was going against him for the Vaida contracts.

To the same effect is Mangalchand's letter (Exhibit W) of the 13th February :—

"We think that immediately after consignment of the goods appertaining to the crops there will be a considerable fall. We shall purchase as much as we possibly can. There is still fifteen to twenty days time for consignment of goods."

On the 16th February Mangalchand writes (Exhibit X) acknowledging receipt of the account sent by the plaintiffs (showing a loss of over Rs. 7,000) in respect of the January Vaida and promising to bring the items to account. He then says he will begin purchasing linseed in twenty days.

On the 20th February (Exhibit Y) he writes :—

"Purchases of ready goods have commenced. We shall send you the railway receipts in respect of linseed and lai in the course of ten-fifteen days. Please consider the same to be as good as received."

On the 25th February (Exhibit Z) he writes :—

"The linseed market will again go down. When the Jamnapur linseed arrives (the market) will go down at once. Thakorji (God) willing it will arrive within fifteen days."

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On the 9th of March (Exhibit AI) he writes :—

"Further, we are going to send a man to you with whom we shall also send the railway receipt in respect of the ready goods. Please exert yourself in transacting the business. Please be writing the rates of ready lai and linseed. The man will reach (you) in five to seven days. Please transact the business of the ready goods with profit. We shall send the same in large quantities. Please rest assured."

The reply of the 12th March (Exhibit 70) shows that the plaintiffs understood this to mean that Mangalchand was sending a man with ready linseed which the plaintiffs were to *sell* profitably : *not* to deliver or to hold against forward contracts already made.

The plaintiffs' next letter, Exhibit 71 of the 19th of March, was in reply to a telegram from Mangalchand of the 16th instructing them to buy 300 bales of Broach cotton. This would close his Broach cotton transactions the Vaida for which began on the 15th. These Broach transactions had gone against him and showed a loss of Rs. 13,000 which made him a debtor to the plaintiffs in Rs. 12,000. The plaintiffs then show anxiety that the settling contract should be acknowledged.

They write :—

"Having entered into a Soda (transaction) as mentioned above, I wrote intelligence (with regard to the same) by wire. Do you be good enough to write acknowledging receipt (of the telegram). Do you be good enough to write and send intelligence about your having made a note of the Soda (transaction). Further, the market for linseed is steady (*powga*). The tendency is up (*teji*). You wrote that you would send ready goods, but the same have not been sent. Therefore (*to*) be good enough to write information (*samachar*) about squaring up the Soda."

It is upon the last sentence in the above extract that the plaintiffs have placed their chief reliance in this appeal. Assuming it is said that the promises to send all the ready linseed, or all the linseed ready, mean that the linseed would be sent to be delivered against the outstanding forward contracts of sale the result of not sending the ready linseed is that the linseed contract

must be settled in another manner. "*To*" (therefore), they say, introduces the consequence of the failure to send ready linseed.

It appears to us for the reasons already indicated in our comments on the correspondence, that the first step in this argument breaks down. The promise was, to "bear" the market with large consignments of ready linseed for sale on commission, *not*, to fulfil the outstanding contracts by premature deliveries. Mangalchand's failure to perform this promise may, when taken in connection with the present loss on Broach cotton, have caused the plaintiffs to press Mangalchand to settle the forward contracts still outstanding. We are, however, by no means satisfied that this is the true purport of the last sentence. It is, we think, more probably a Marwari iteration of what has gone before concerning the closing Broach contract. An instance of the custom of iteration and re-iteration will be found in another much discussed letter Exhibit T which closes by asking for the third time for a letter containing particulars although the request has no connection with that part of the letter which immediately precedes it.

Speaking generally the correspondence of Mangalchand only indicates a desire to keep the plaintiffs in good humour by promises which he had no intention of performing, while Exhibit 71 will not support the edifice of inference which the appellant's counsel would have us build upon it.

We are of opinion for the above reasons that the learned Judge was right in his conclusions. We are unable, however, to agree that the defendant who successfully pleaded a lawful defence was not entitled to his costs. We affirm the decree in so far as it dismisses the plaintiffs' suit; but vary it by ordering that

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the plaintiffs do pay the defendant's costs. The plaintiffs must also pay the defendant's costs of the appeal.

Attorneys for the appellants: *Messrs. Madhowji, Kamdar and Chhotubhai.*

Attorneys for the respondents: *Messrs. Malvi, Hiralal, Mody and Ranchhoddas*

Decree varied.

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ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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February 28.

IN THE MATTER OF THE COMPANIES ACT VI OF 1882

AND

IN THE MATTER OF THE PIONEER BANK LIMITED.
CHANIRAM VALLIRAM, PETITIONER.

*Indian Companies Act (VI of 1882), sections 128 and 131—Winding up—
Petition for compulsory winding up of company by the Court—Grounds to be
alleged in petition—Internal mismanagement of the company not such grounds—
Admission of petition, discretion of Court as to—Shareholder, petition by.*

Any ground alleged under section 128 (e) of the Indian Companies Act in a petition for the winding-up of a company presented under section 131 of that Act must be of a like nature to the specific grounds given under clauses (a), (b), (c) and (d) of section 128. If any other grounds are alleged they do not fulfil the requirements of the Act. Allegations as to the internal management or mismanagement of a company are matters for the shareholders to deal with and do not call for the interference of the Court.

A petition by a shareholder stands in a different footing to a petition by a creditor and should be more closely scrutinized on presentation.

There is no obligation on the Court to admit a petition merely because it is presented. Not only must a petition allege facts which, if proved, would justify an order for winding up a company but even if it alleges such facts the Judge has a discretion to consider whether it is really *bona fide*.

The Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

THE petitioner filed a petition in which (*inter alia*) he stated that the Pioneer Bank was a limited company, established for the purpose of doing banking business, and that the petitioner was a shareholder of the company, holding 10 shares of Rs. 25 each, on each of which Rs. 10 had been paid up. The petitioner alleged various acts of misconduct in the management of the company and submitted that the whole company was a bogus company and that the *substratum* of the company had already been lost through the transactions complained of and prayed that the company might be wound up by the Court under the provisions of the Indian Companies Act, that a provisional liquidator might be appointed to take charge of the affairs of the company, that auditors might be appointed to look into the affairs of the company and to report and for other relief.

The petition was opposed by the company but was admitted by Mr. Justice Davar and subsequently a provisional official liquidator was appointed and also auditors to audit the company's books and report and a report was made by such auditors accordingly. The matter ultimately came before Mr. Justice Macleod who on the 17th of January 1914 adjourned it in order to enable the shareholders of the company to meet and ascertain whether they would continue the business or pass a resolution for the voluntary winding-up of the company. The shareholders at their meeting having decided to continue the business, the matter came again before Mr. Justice Macleod.

Strangman (Advocate General) for the petitioner.

Desai for the company

MACLEOD, J.:—This petition was presented on the 29th of November 1913, under the Indian Companies Act, VI of 1882, praying that the Pioneer Bank should be wound up. It came on for hearing before me on the 17th of

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January and I adjourned it in order to enable the shareholders of the Bank to meet and ascertain whether they should continue the business or pass a resolution for the voluntary winding-up of the Bank. The shareholders have now decided to continue the business and therefore the petition stands dismissed for this reason that it does not comply with the provisions of section 131 of the Indian Companies Act, which states that the petition must allege facts which, if proved, will justify an order for winding-up the company. Section 128 enacts the circumstances under which a company may be wound up by the Court :—

(a) Whenever the company has passed a special resolution requiring the company to be wound up by the Court :

(b) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year :

(c) Whenever the members are reduced in number to less than seven :

(d) Whenever the company is unable to pay its debts :

(e) Whenever, for any other reason of a like nature, the Court is of opinion that it is just and equitable that the company should be wound up.

The first four grounds for winding up a company are specific, and any other ground alleged under (e) must be of a like nature to those given under headings (a) to (d). The allegations in the petition all relate to the internal management or rather mismanagement of the company's affairs and that is a matter for the shareholders themselves to deal with. It is not a matter that would call for interference by the Court : so this petition is not in accordance with the provisions of the Act, and if it had been presented to me, I should have declined to accept it. There is no obligation whatever on the Court to admit a petition merely because it is presented. In the first place it must, as I have already stated, allege facts which, if proved, would justify an order for winding up a company and therefore perusal is necessary. But even if a petition does allege such facts, then the

Judge has a discretion, since the admission of the petition must inevitably damage the credit of the company concerned, to consider whether it really is a *bonâ fide* one. Otherwise, the door would be laid open to unlimited opportunities for blackmail, especially in times of financial panic. For a discontented shareholder might cause serious, if not irreparable, damage to a company by presenting a petition which, if the Judge were bound to accept it, would, under Rule 636, have to be advertised in the newspapers fourteen days before the hearing, with the result that the company would have to close its business for the time, as no director would dare to authorise payments being made which he might be liable to refund in the case of a winding-up order being passed.

In this case, the petitioner is a shareholder for ten shares, on which Rs. 100 have been paid up and on which there is a liability of Rs. 150. It is difficult to conceive that the petitioner was actuated by proper motives in presenting his petition, which, if successful, would most probably result, so far as he was concerned, in his being called upon to pay another Rs. 150. A petition by a shareholder stands on a different footing to a petition by a creditor. It should be more closely scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent company is unable to pay its debts, and in such a case the company must pay the debt or submit to a winding-up order. A shareholder's petition must, as a general rule, allege one of the grounds under headings (a), (b), (c) and (d) or any grounds which the Court is satisfied is of a like nature to those in section 128, and if any of those grounds are alleged, there is little doubt that the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged, the petition does not satisfy the requirements of the Act. The procedure provided

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by the Act and the Rules on the presentation of petitions for winding up do not seem to my mind to be as clear as they ought to be, and I, therefore, take the opportunity of pointing out that, in my opinion, there is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case, so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

In this case the company has not pressed for costs against the petitioner, as I am told such an order would be valueless to them, the petitioner not being a man of any means, and therefore it has consented to the petition being dismissed without costs; otherwise, I should have made the petitioner pay its costs.

Attorneys for the Bank: *Messrs. Matubhai Jamietram & Madan.*

Attorneys for the petitioner: *Messrs. Patel & Ezekiel.*

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

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July 7.

JOSHI LAXMIRAM LALLUBHAI AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, *v.* MEHTA BALASHANKAR VENIRAM (ORIGINAL
DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Schedule II, Article 179—Limitation Act (IX of 1908), Schedule I, Article 182—Civil Procedure Code (Act XIV of 1882), sections 351 and 357—Decree on mortgage—Application for execution—Mortgagor's petition for declaration of insolvency—Opposition by mortgagee judgment-creditor—Step-in-aid of execution—Limitation.

An application by mortgagee judgment-creditor in execution of his decree, opposing the insolvency proceeding of the mortgagor judgment-debtor, is a

* Second Appeal No. 929 of 1913.

step-in-aid of execution under Article 179, Schedule II of the Limitation Act (XV of 1877), and Article 182, Schedule I of the Limitation Act (IX of 1908).

SECOND appeal against the decision of E. Clements, District Judge of Ahmedabad, reversing the order of M. I. Kadri, Subordinate Judge of Umreth, in an execution proceeding.

The facts were as under :—

The plaintiffs obtained a decree on a mortgage against the defendant. The decree was dated 19th September 1903. On the 8th August 1905 the plaintiff judgment-creditors applied for the execution of the decree under darkhast No. 427 of 1905 and prayed only for the attachment and sale of the mortgaged house. No further relief was claimed in the darkhast. On the 6th January 1906 the defendant judgment-debtor applied to be declared an insolvent. The application for insolvency was opposed by the judgment-creditors. Under the proceedings in execution of the judgment-creditors' aforesaid darkhast the judgment-debtor's house was sold on the 26th June 1906. On the 29th September 1906 the first Court declared the judgment-debtor insolvent and the judgment-creditors preferred an appeal. Subsequently the first Court struck off the said darkhast for execution on the 7th December 1906 on two grounds, namely, that (1) it had been satisfied and (2) the judgment-debtor was adjudicated an insolvent. On the 6th December 1910 the judgment-creditors' appeal against the order of the first Court declaring the judgment-debtor to be an insolvent succeeded and, thereupon, they, on the 18th October 1911, presented a fresh darkhast, No. 462 of 1911, for the execution of their decree and prayed for the arrest of the judgment-debtor.

The judgment-debtor contended that the darkhast was time-barred.

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The Subordinate Judge overruled the judgment-debtor's contention. He found that the judgment-creditors were entitled to have the period between the 6th January 1906 and the 6th December 1910 during which the judgment-debtor's application for insolvency was pending excluded from being counted towards limitation. Therefore, following the ruling in *Chintaman Damodar Agashe v. Balshastri*⁽¹⁾ he held that the darkhast was in time.

The judgment-debtor having appealed, the District Judge found that the darkhast was not in time. He, therefore, reversed the order and dismissed the darkhast observing :—

The case relied upon by the lower Court for treating darkhast 462 as a renewal of the proceedings of 1906, *Chintaman Damodar v. Balshastri* (I. L. R. 16 Bom. 294) is distinguishable, as here the Original Darkhast did not ask for the arrest of the judgment-debtor, or for anything else beyond the sale of the house. The judgment-creditor knowing of the insolvency proceedings ought to have presented a darkhast for all his remedies. I see no equities in the case sufficient to lead the Court to strain the meaning of the judicial decisions on this point of limitation.

The plaintiff judgment-creditors preferred a second appeal.

H. V. Divatia for the appellants (plaintiff judgment-creditors) :—Our second darkhast for execution, though presented more than three years after the first, was within three years from the termination of the judgment-debtor's insolvency proceedings and those proceedings operated in law as an injunction.

When a person is declared insolvent, though not discharged, he cannot be arrested in execution of a decree because the decree-holder cannot execute his decree *pari passu* with the insolvency proceedings: section

(1) (1891) 16 Bom. 294.

357 of the Civil Procedure Code of 1882, *Panangupalli Seetharamaya v. Nanduri Ramachendrudu*⁽¹⁾, *Gauri Datt v. Shankar Lal*⁽²⁾.

In connection with the first darkhast, the reason given by the Court for striking it off was the declaration of the judgment-debtor's insolvency. So the order of the Court had the effect of staying proceedings under section 15 of the Limitation Act of 1877.

Where there is a temporary bar to the execution of a decree, the application made after the bar is removed is not barred by limitation : *Rudra Narain Guria v. Pachu Maity*⁽³⁾.

Manubhai Nanabhai for the respondent (defendant judgment-debtor):—The new Limitation Act, 1908, came into force on the 1st January 1909. The darkhast having been time-barred on the 8th August 1908 could not be revived by the new Act: sections 6 (a), (c) and 8 of the General Clauses Act. Section 15 of the Limitation Act of 1877 applied only to suits and not to applications for execution.

Assuming that the new Limitation Act of 1908 applies, *institution* of the application was never restrained. Moreover, the order adjudicating the judgment-debtor to be an insolvent existed only for one year and six months and the exclusion of the said period could not bring the case within limitation.

Insolvency proceedings do not *per se* operate as an injunction. An order under section 351 of the Code of 1882 does not purport to discharge the judgment-debtor so as to bar his arrest.

Divatia in reply:—The liberal construction put by the Madras High Court in *Panangupalli Seetharamaya v. Nanduri Ramachendrudu*⁽¹⁾ may be adopted.

⁽¹⁾ (1904) 28 Mad. 152.

⁽²⁾ (1892) 14 All. 358.

⁽³⁾ (1896) 23 Cal. 437.

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Even though section 15 of the new Limitation Act of 1908 be held inapplicable, the present case may be viewed from another standpoint. Our opposition to the judgment-debtor's insolvency should be regarded as a step-in-aid of execution of our decree under Article 179 of the old Limitation Act of 1877, corresponding with Article 182 of the new Limitation Act of 1908. It was necessary for us to apply to the "proper Court" to have the judgment-debtor's insolvency set aside before we could apply for his arrest.

BEAMAN, J. :—The facts in this case are somewhat unusual. There was an ordinary mortgage decree of the year 1903. The mortgagee applied for execution in due course on the 8th of August 1905. In January 1906 the mortgagor applied under the old Code of Civil Procedure to be declared an insolvent. In his application of August 1905 the mortgagee asked that the property might be sold, but did not seek any further relief against the mortgagor. Accordingly in June 1906 the property was sold under this darkhast. In September of the same year the Court declared the mortgagor an insolvent, although under section 351 it did not discharge him. In December of the same year the Court struck off the darkhast of August the 8th, 1905, for two reasons: (1) that it had been satisfied, (2) that the judgment-debtor was now an adjudicated insolvent. The mortgagee appeared from the first in the insolvency proceedings as the sole opposing creditor.

We might find some difficulty, more, speaking for myself, I think a verbal than a real difficulty in bringing such appearance within the meaning of the words "application to take some step-in-aid of execution" under Article 179 (old), now Article 182 of the Schedule to the Limitation Act. But as the result of those proceedings was against him, the creditor, appellant here, appealed to the District Court and

succeeded. We think that it is not putting too great a strain upon ordinary language to say that an appeal in such circumstances fairly falls within the meaning of the words: "an application to take a step-in-aid of execution." It is clear that as long as the insolvency proceedings went in favour of the debtor, the creditor could not have presented any application in ordinary course for the further execution of his decree with the least hope of success. Two at least of the High Courts in India had already put so liberal a construction upon the insolvency provisions of the old Civil Procedure Code that an executing creditor must have foreseen that no application for the execution of the decree either by sale of property or arrest of the person of the judgment-debtor could have the least chance of success so long as the judgment-debtor had been declared an insolvent under section 351, even although he had not been actually discharged within the meaning of section 357. So that we think that in view of the Court's finding that this judgment-debtor was an insolvent early in 1906, the present appellant had no other course open to him than in the first instance to get this bar to the further execution of his decree removed, and the only way in which he could hope to obtain that result would be by first opposing the insolvency petition in the first Court, and if he failed there, by appealing to higher authority. This he did, and although it is unnecessary to trace the subsequent tedious proceedings, it is sufficient to say that his last appeal could not have been made earlier than January 1909, that is to say, well within three years of his present darkhast.

Adopting that view, it is unnecessary to enter into any of the other nice and difficult questions which have been raised and adequately argued in the course of this appeal. We do not seek to lay down any general principle upon any of those questions, but we desire to

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confine our judgment to the rather unusual facts before us, and we think that we do no violence to the meaning of Article 179 (old), now Article 182, by holding that the present darkhast is within three years of the last application made by the judgment-creditor to a Court to take some step-in-aid of the execution of his decree. For these reasons we think that the appeal ought to be allowed and the judgment of the Court below reversed. We direct, therefore, that the darkhast be restored and that execution do proceed upon it according to law. We think that this appeal must be allowed with all costs.

Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

MANJUNATH SUBRAYABHAT (ORIGINAL PLAINTIFF), APPELLANT, v.
SHANKAR MANJAYA (ORIGINAL DEFENDANT), RESPONDENT.*

Vritti inalienable—Alienation in special cases under special conditions—Local usage and custom.

As a general rule *vrittis* are inalienable. They may be alienated in special cases and under special conditions provided that such alienations can be supported by local usage and custom.

Rajaram v. Ganesh⁽¹⁾, referred to.

SECOND appeal against the decision of C. V. Vernon, District Judge of Kanara, reversing the decree of V. V. Bapat, Subordinate Judge of Honavar.

The plaintiff sued in the year 1908 to recover from the defendant Rs. 49-15-11 alleged to be due to him on account of his purchase of a $\frac{3}{4}$ share of a *vritti* consisting of cash allowance.

* Second Appeal No. 574 of 1912.

⁽¹⁾ (1898) 23 Bom. 131.

The defendant denied knowledge of the plaintiff's purchase and contended that the right to the cash allowance was inalienable beyond the life-time of the plaintiff's deceased vendor, that the plaintiff or his predecessor never performed the worship in respect of the allowance and consequently the plaintiff was not entitled to the allowance and that the suit was not maintainable without a certificate from the Collector under the Pensions Act.

The Subordinate Judge dismissed the suit for want of a certificate under the Pensions Act.

The plaintiff having appealed and produced the necessary certificate the District Judge restored the suit and remanded it for decision on the merits.

On the remand the Subordinate Judge allowed the plaintiff's claim. In the judgment the Subordinate Judge remarked :—

The right to worship and its remuneration is ordinarily inalienable but when as here the alienation is to a member of the family or to a Brahmin of the same caste as the alienor and equally competent to perform the worship it cannot be said to be opposed to the principles of Hindu Law or public policy.

On appeal by the defendant the District Judge remanded the case for findings on issues observing :—

The chief point for decision appears to be whether the alienation of the Pujehakka and Tastik is valid. The general principle appears to be to discourage such alienations, especially in the case of strangers but in certain cases they have been upheld. As the High Court has observed in *Rajaram v. Ganesh* (I. L. R. 23 Bom. page 131) "by force of custom a limited right of partition and alienation might be established, and the custom must be ascertained by evidence in each class of cases". The lower Court has not formally enquired into this point and I therefore follow the example of the High Court in the case quoted above and send down the following issues for a finding on the same :—

(1) Whether a custom and practice of the alienation of the Pujehakka and Tastik in dispute was established either generally or as limited to particular classes of heirs or relations ?

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(2) Whether the alienation to the plaintiff-respondent falls within or is governed by such custom and limitation ?

(3) Whether the claim to Narayan's (plaintiff's vendor's) share is time-barred in respect of the two years 1904 and 1905 ?

The findings of the Subordinate Judge on the first two remanded issues were in the negative and on the third in the affirmative.

The said findings having been certified to the District Judge, the appeal was allowed and the suit was dismissed.

The plaintiff preferred a second appeal.

S. S. Patkar, for the appellant (plaintiff).

There was no appearance for the respondent (defendant).

BEAMAN, J. :—The property in question in this suit is a *vrithi*. The plaintiff claims to be the alienee of three-quarters of the cash allowance paid for the due performance of ceremonies and the worshipping of the idol. The first Court held that the alienation was good and decreed the plaintiff's claim. On appeal the learned Judge remanded certain issues inviting an inquiry into any local custom which would justify the alienation of such a peculiar right as this to one who was not a member of the original family which enjoyed the priestly privilege. The findings on the remanded issues were all against the plaintiff. His suit was accordingly dismissed.

On appeal it has been strenuously contended that the learned Judge of first appeal adopted a wrong method. It is said that the general principle is that *vrithis* are alienable to suitable persons, unless a local custom to the contrary or some prohibition by the founder can be proved. This certainly does appear to be the effect of Melvill, J.'s decision in the case of *Mancharam*

v. *Pranshankar*⁽¹⁾. On the other hand there is a much later decision by Ranade, J., in the case of *Rajaram v. Ganesh*⁽²⁾, which, in our opinion, states both the underlying principle and method of dealing with cases like this more correctly. It is true that in that judgment the learned Judge refers with seeming approval to the case of *Mancharam v. Pranshankar*⁽¹⁾, but the principle, he lays down, is that the general rule is against the alienability of *vrittis*. *Vrittis* may be alienated in special cases and under special conditions provided that such alienations can be supported by local usage and custom. That this was his ground is clear enough from the issues which he framed and remanded for trial. The learned Judge of first appeal appears to have followed exactly the course adopted by the learned Judges in *Rajaram v. Ganesh*⁽²⁾, and having regard to the character of these *huks* and the desirability of preventing too free alienations of what in essence is a sacred and personal right, we are not prepared to say that the learned Judge of first appeal was wrong. We, therefore, think that his decree must now be confirmed and this appeal dismissed.

Appeal dismissed.

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(1) (1882) 6 Bom. 298.

(2) (1898) 23 Bom. 131.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

SUNDRA ALIAS NARABADA (ORIGINAL DEFENDANT 1), APPELLANT, v. SAKHARAM GOPALSHET GANDHI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Suit for declaration and recovery of possession—Defence of res judicata—Parties not adequately represented in the former suit and suit not fully tried—No bar of res judicata.

A suit brought by three plaintiffs as surviving coparceners of a joint Hindu family for a declaration that the property in suit formed part

* First Appeal No. 146 of 1913.

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of the joint family property and for possession was met by the plea of *res judicata*.

The previous suit, the decision in which was set up as *res judicata*, was filed in the year 1909 by the father of the present plaintiffs 2 and 3, who were minors and who were not joined as parties, against the present defendants and the present plaintiff 1 as defendant 4. The relief claimed in that suit was the same as that claimed in the present suit. The finding in that suit showed conclusively that the father of the present plaintiffs 2 and 3, who were then minors and were not parties, did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed.

Held, that the bar of *res judicata* did not arise as the present plaintiffs 2 and 3 were then minors and were not adequately represented.

Held further, that the present plaintiff 1, who was defendant 4 in the former suit, was no more than a *pro forma* defendant and took no active part and was not bound by the result of that suit the decree in which was in his favour.

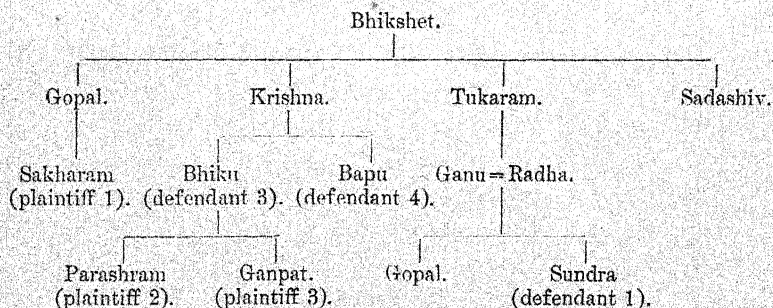
Raja Rampal Singh v. Ram Ghulam Singh⁽¹⁾, distinguished.

FIRST appeal against the decision of K. B. Wassoodew, Assistant Judge of Ratnagiri, in suit No. 128 of 1912.

The three plaintiffs (1) Sakharam Gopalshet Gandhi, (2) Parashram Bhikushet Gandhi and (3) Ganpat Bhikushet Gandhi, a minor by his guardian brother No. 2, brought the present suit as the surviving coparceners of a joint Hindu family to recover certain property and for a declaration to possess certain other property.

The defendants set up the preliminary plea of *res judicata*.

The relationship of the parties is shown in the genealogical tree below :—



⁽¹⁾ (1904) L. R. 32 I A 17.

The plaintiffs alleged that they and their uncle Tukaram were joint owners of certain lands. Tukaram traded in Bombay with the family nucleus and died leaving him surviving a son Ganu. The latter also died leaving a widow Radha, a son Gopal and a daughter Sundra. Some time after Ganu's son Gopal died and Radha collected her property including the assets of her husband and son and went to live with her brother Shamshet. After some time Radha died leaving her surviving her daughter Sundra. At the time of Radha's death, Shamshet was in possession of some of her property and the rest was in the possession of Sundra.

In 1909 Bhiku and Bapu as the survivors of the joint family had brought a suit against Shamshet and Sundra in respect of the property comprised in the present suit and claimed identical relief. Parashram and Ganpat who were minors then were not made parties. Sakhamram Gopal, who was joined in the suit as defendant 4, was merely a *pro forma* defendant. That suit was dismissed.

The plaintiffs, thereupon, brought the present suit and the principal defendants 1 and 2 Sundra and Shamshet respectively contended that the suit was barred as *res judicata* by reason of the decision in the suit of 1909, as the plaintiffs 2 and 3 were then represented by their father Bhiku and plaintiff 1 was then defendant 4.

The Assistant Judge found that the decision in the former suit did not operate as *res judicata* and he allowed the suit to proceed. His grounds were :—

"The whole suit appears to have been conducted by the plaintiffs with a singular want of industry or interest." This is in short the conduct of the plaintiffs in the former suit, whose action, it is urged, should be binding on the present plaintiffs. In view of the above facts I do not think that the plaintiffs in the present case were fully and fairly represented in the former suit and so far as plaintiffs 2 and 3 are concerned the former decision cannot operate as *res judicata*.

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With regard to plaintiff 1 who was defendant 4 in the former suit, it is an admitted fact that he did not defend that suit. He was impleaded as a matter of form and no specific relief was claimed against him. The plaintiffs in that suit contended that defendant 4 was not living in union with the descendants of the deceased Tukaram. On this point the order of the Court is silent and therefore it cannot be said that the issue between the plaintiffs and defendant 4 was finally decided in that suit.

Defendant 1 Sundra appealed.

V. R. Sirur for the appellant (defendant 1):—We rely on the plea of *res judicata*. The former suit was decided against the father of the present plaintiffs 2 and 3, so they cannot re-agitate the question of their title: *Raja Rampal Singh v. Ram Ghulam Singh*⁽¹⁾.

K. N. Koyaji for the respondents (plaintiffs):—The decision relied on has no application. That was the case of a son claiming as heir under his father. Here the sons claim independently of their father in respect of ancestral family property. Further the father did not represent his minor sons who were not parties to that suit in a proper and adequate manner as is manifest from the judgment of the first Court and of the High Court in appeal. They are, therefore, not bound by the result of that suit. Plaintiff 1 who was defendant 4 in the former suit was not a necessary party. He took no active part in that suit and it was not necessary to decide any questions between him and the then plaintiff.

Sirur in reply:—The question of *res judicata* cannot be affected by the circumstance that the present plaintiffs 2 and 3 who were then minors were not adequately represented by their father. They claim under their father who was then the managing member and are, therefore, barred under section 11 of the Civil Procedure Code. Plaintiff 1, who was defendant 4 in

⁽¹⁾ (1904) L. R. 32 L. A. 17.

the former suit, is also barred as the issues and findings in that suit covered his rights in the property.

BEAMAN, J. :—The plaintiffs, three in number, in this suit are seeking to obtain property from the defendant-appellant, grand-daughter of one Tukaram, on the ground that Tukaram and their ancestors were joint. The only question which we have to answer here is whether the matter in issue is *res judicata* by reason of the decision in a suit of 1909 in which the present plaintiff 1 was defendant 4, and the father of the present plaintiffs 2 and 3 was plaintiff. Doubtless we should have been glad to hold that the matter was *res judicata*, although the position occupied by plaintiff 1 in that suit might have occasioned some difficulty, for there can be no doubt but that the matter substantially in issue here was substantially in issue there, and was decided against the father of the present plaintiffs 2 and 3. Unfortunately plaintiffs 2 and 3 were not made parties to that suit. Still the matter might have been *res judicata* against them under the principle, and, we think, also the words of section 11 of the Civil Procedure Code which has recently been interpreted in this sense by their Lordships of the Privy Council in the case of *Raja Rampal Singh v. Ram Ghulam Singh*⁽¹⁾, had it not been for a very important circumstance which distinguishes this case from cases falling in that general class. Here the plaintiffs 2 and 3 were minors at the time of the suit of 1909, and the finding of the learned Judge who tried that suit shows conclusively that the father of these minors did not adequately represent them. He comments most adversely upon the manner in which the suit was conducted before him, and makes the conduct of these plaintiffs' father the ground of saddling the defendants in spite of their success with their own

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costs. In these circumstances we feel that it would be impossible to say that these minors who were not parties to that suit, and are judicially declared not to have been adequately represented at the trial, are bound by its result. They are, therefore, at liberty to proceed with the present litigation, and since plaintiff 1 was no more than a *pro forma* defendant in the former suit, and appears to have taken no active part in it, and the decree speaking generally appears to have been in his favour as one of the defendants, we feel some doubt in holding that he is bound by the result either, to the extent of being precluded from prosecuting this litigation. We must, therefore, confirm the decree of the Court below upon this preliminary point and remand the case to be dealt with upon the merits. Costs costs in the cause.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

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CHAND KANJI (ORIGINAL OPPONENT), RESPONDENT.*

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Suit in a Baroda Court—Defendant's objection to jurisdiction and other pleas—Defendant's contentions overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.

In a suit brought in a Baroda Court, the defendant objected to the jurisdiction of the Court to try the suit and also raised other pleas. The Court overruled the defendant's contentions and passed a decree against him. The decree having been subsequently transferred to a British Court for execution that Court refused to execute it on the ground of its being a nullity as the defendant had not voluntarily submitted to the jurisdiction of the Baroda Court, he having

* Second Appeal No. 640 of 1913.

protested against the right of that Court to entertain the suit at the earliest opportunity.

Held that, having regard to circumstances, the case was one of voluntary submission to the jurisdiction of the Baroda Court as the defendant had raised other pleas along with his objection to the jurisdiction of the Court to entertain the suit and that the decree passed by that Court could be executed by a British Court.

Parry & Co. v. Appasami Pillai⁽¹⁾, distinguished.

SECOND appeal against the decision of N. R. Majmudar, First Class Subordinate Judge of Surat with appellate powers, confirming the order passed by Beram N. Sanjana, Second Class Subordinate Judge of Surat, in an execution proceeding.

The facts were these :—

The plaintiff Harchand Panaji brought a suit to recover a sum of money due on a khata against the defendant Kanji Kapura in the Court of the Munsiff of Vyara in Baroda. Kanji appeared by a pleader to defend the suit and contended *inter alia* that the suit was defective for want of parties, that it was time-barred and that the Court had no jurisdiction to entertain the suit for two reasons, namely, (1) because he was a non-resident foreigner and (2) because he had no property in Baroda territory and the khata sued on had been passed at Pal in British India, the cause of action had not, therefore, arisen within the local limits of the jurisdiction of the Court. The Court found that the suit was not defective for want of parties, that it was not time-barred and that the debt had originally been contracted at Pal but the last khata had been passed at Vyara, therefore, the Court had jurisdiction to entertain the suit although the defendant was a non-resident foreigner under Baroda Law. A decree was, therefore, passed in plaintiff's favour and it was subsequently transferred to the Court of the Second Class Subordinate

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(1) (1880) 2 Mad. 407.

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Judge of Surat for execution against the estate of the deceased defendant Kanji Kapura whose legal representative Gulabchand Kanji was brought on the record. Gulabchand opposed the execution on several grounds, the principal among them was that the decree was a nullity so far as British Courts were concerned under the International Laws.

The Subordinate Judge allowed the defendant's contention and following the ruling in *Gurdyal Singh v. Raja of Faridkot*⁽¹⁾ refused to execute the decree.

On appeal by the plaintiff the appellate Court confirmed the order observing :—

It is admitted Kanji Kapura was a non-resident foreigner and owed no allegiance to the Baroda Durbar. It is also conceded that on the principles of International Law, as laid down in the leading case of *Gurdyal v. Raja of Faridkot*, I. L. R., 22 Cal. 222, the decree would have been a nullity, had the defendant not appeared and defended the suit. But it is urged that the conduct of the defendant in employing a pleader amounted to submission to jurisdiction of the Vyara Court and that therefore the decree is binding on him and his estate. It has, no doubt, been laid down in *Shaik Atham Sahib v. Darud Sahib*, I. L. R., 32 Mad. 469, that a person who appears in obedience to the process of the foreign Court and defends, or applies for leave to defend the action without objecting to the jurisdiction of the Court, when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court, and that it would be clear bad faith on his part having once elected to submit to the forum chosen by his opponent and taken the chance of a decision in his favour in that forum to turn round and say afterwards, when the decision has gone against him that the judgment was without jurisdiction. But in the present case the defendant protested against the right of the Vyara Court to entertain the suit at the earliest opportunity. Not only that but he did not make any other defence to the claim. It is manifest, therefore, that he did not voluntarily submit to the jurisdiction of the Vyara Court and that the decree is a nullity. See *Parry & Co. v. Appasami Pillai*, I. L. R., 2 Mad. 407

The applicant-plaintiff preferred a second appeal.

T. R. Desai for the appellant (applicant-plaintiff) :—
The order refusing to execute the decree of the Baroda

(1) (1894) 22 Cal. 222.

Court against the estate of the deceased judgment-debtor is wrong on two grounds :—First, the lower Court had no jurisdiction in execution proceedings to question the jurisdiction of the Baroda Court which passed the decree. No doubt under the old Code of 1882 it could do so : *Haji Musa Haji Ahmed v. Purmanand Nursey*⁽¹⁾, but under the present Code of 1908 that power is taken away by the omission of the words in Order XXI, Rule 7 : *Hari Govind v. Narsingrao Konherra*⁽²⁾. Section 44 of the Code should be read with Order XXI, Rule 7. The decree of the Baroda Court was validly transferred to the Surat Court and the latter Court was bound under the said Order and Rule to proceed with execution without entering into the question of the jurisdiction of the Baroda Court.

[SCOTT, C. J.:—But Order XXI, Rule 7, applies to execution of decrees passed by British Courts ; decrees of foreign Courts are still regulated by section 13 of the Civil Procedure Code.]

We submit that the defendant's remedy was to apply to higher tribunal of the Baroda State if he was not satisfied with the decree. Section 13 of the Code applies where the record shows on the face of it that the foreign Court had no jurisdiction, and not where the question of jurisdiction is expressly raised and decided. There is nothing in the Baroda law which is opposed to natural justice. The khata in suit having been passed within Baroda limits, the Baroda Court had territorial jurisdiction under the Civil Procedure Code of Baroda. The provisions of the Baroda Code are similar to section 17 of the Civil Procedure Code of 1882.

Secondly, even if the Surat Court could enter into the question, the defendant must be deemed to have voluntarily submitted to the jurisdiction of the Baroda

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(1) (1890) 15 Bom. 216.

(2) (1913) 38 Bom. 194.

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Court and it is not now open to him to contend that the decree is not binding against the estate. See the observations of Napier, J., in *Ramanathan Chettiar v. Kalimuthu Pillai*⁽¹⁾ where the decree was not *ex parte*. The defendant not only put in his appearance in the Baroda Court but filed a written statement and contested the suit on various grounds. This is not a case of merely protesting against jurisdiction. He did not withdraw after the protest but took the chance of a decision on the merits. This distinguishes the present case from the cases relied on by the lower Court: *Parry & Co. v. Appasami Pillai*⁽²⁾, *Sivaraman Chetti v. Ibura Saheb*⁽³⁾, *Shaik Atham Sahib v. Davud Sahib*⁽⁴⁾. The order dismissing the darkhast is thus bad in law and execution should be directed to proceed.

G. N. Thakore for the respondent (legal representative of the defendant):—The Surat Court had jurisdiction to consider the question whether the Baroda Court had jurisdiction to pass the decree. Section 13 (1) of the Code is clear. There could be no bar; otherwise there would be an anomaly, for it would mean that when a suit is brought on a foreign judgment, the question of jurisdiction can be gone into, and not when the decree on the same foreign judgment is sent for execution to a British Court. Such an anomaly could not have been intended by the Legislature. Then again the decree of the Baroda Court was without jurisdiction because the judgment-debtor admittedly resided within British India. The Baroda Court could not claim jurisdiction over a non-resident foreigner. The observations of the Privy Council in *Gurdial Singh v. Raja of Faridkot*⁽⁵⁾ cover the case. The deceased defendant having from the beginning protested against the jurisdiction of the

(1) (1912) 37 Mad. 163 at p. 167.

(3) (1895) 18 Mad. 327.

(2) (1880) 2 Mad. 407.

(4) (1909) 32 Mad. 469.

(5) (1894) 22 Cal. 222 at p. 233.

Baroda Court could not be deemed to have voluntarily submitted to it, so that the decree has not the same effect against him as if pronounced *in absentia*. It cannot be said that the lower Courts were wrong in applying the test laid down in the Madras case referred to by them. The present case is governed by the decision in *Haji Musa Haji Ahmed v. Purmanand Nursey*⁽¹⁾. The English cases show that the defendant would not be barred by a decree passed under such circumstances: *Rousillon v. Rousillon*⁽²⁾, *Schibsby v. Westenholz*⁽³⁾, *Emanuel v. Symon*⁽⁴⁾, *Copin v. Adamson*⁽⁵⁾.

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Desai, in reply :—There was a voluntary submission to the jurisdiction of the Baroda Court. There was no coercion or pressure put upon the defendant as in *Parry & Co. v. Appasami Pillai*⁽⁶⁾. The ruling in *Companhia De Mocambique v. British South Africa Company*⁽⁷⁾ applies and disposes of the defendant's contention.

SCOTT, C. J.:—The lower Courts have declined to execute a decree of a Baroda Court against the respondent's father Kanji Kapura which had been transferred for execution against his estate to the Court of the Second Class Subordinate Judge of Surat.

The learned Judge of the lower appellate Court states that it was conceded that on the principles of International Law as laid down in *Gurdyal Singh v. Raja of Faridkot*⁽⁸⁾, the decree would have been a nullity had the defendant not appeared and defended the suit in the Baroda Court, and that it was argued before him that the defendant had voluntarily submitted to the

(1) (1890) 15 Bom. 216.

(2) (1880) 14 Ch. D. 351.

(3) (1870) L. R. 6 Q. B. 155.

(4) [1907] 1 K. B. 235.

(5) (1874) L. R. 9 Ex. 345.

(6) (1880) 2 Mad. 407.

(7) (1892) 66 L. T. 773.

(8) (1894) 22 Cal. 222.

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jurisdiction by employing a pleader to defend the suits. As to this the learned Judge of the lower appellate Court says that the defendant protested against the right of the Baroda Court to entertain the suit at the earliest opportunity and did not make any other defence.

We have referred to the statement of the pleadings and issues in the Baroda Court and find that the statement of the lower appellate Court is incorrect.

The defendant pleaded, first, that the plaintiff had no right to sue as the sum claimed was vested in him by inheritance as the brother of the plaintiff's father's deceased brother's widow. Secondly, that, if not, the suit was defective for want of parties as the other brothers of the plaintiff's father were not joined. Thirdly, that the plaintiff's suit could not be entertained as the money dealings relied on took place outside the jurisdiction of the Court. Fourthly, that the plaintiff's suit would not lie in that Court as the defendant had no property and did not reside or carry on business in Baroda territory. Fifthly, that the suit was time-barred.

Upon this defence four issues were raised :—

1. Is the suit defective for want of parties ?
2. Is the suit barred by time ?
3. Does the suit lie in this Court ?
4. What relief should be granted to the plaintiff ?

All the issues were decided in the plaintiff's favour after evidence had been adduced by both sides.

The case appears to us to be clearly one of voluntary submission to the jurisdiction, the defendant taking his chance of getting a decree in his favour : see *Boissiere & Co. v. Brockner & Co.*⁽¹⁾ and *Voinet v. Barrett*⁽²⁾. The case is a stronger one in favour of the appellant than

⁽¹⁾ (1889) 6 T. L. R. 85.

⁽²⁾ (1885) 55 L. J. Q. B. 39.

that of *Parry & Co. v. Appasami Pillai*⁽¹⁾, relied on in the lower Courts, for there was not preliminary decision of the question of jurisdiction on the protest of the defendant and no circumstance of pressure such as the Madras Court thought existed in *Parry & Co.'s* case⁽¹⁾.

We set aside the decree of the lower appellate Court and return the darkhast for execution of the Baroda Court's decree in the Court of the Second Class Subordinate Judge of Surat.

The respondent must pay the costs of his opposition to the darkhast up to date.

Decree set aside.

G. B. R.

⁽¹⁾ (1880) 2 Mad. 407.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

RAMA VALAD TULSA MAHAR (ORIGINAL PLAINTIFF), APPELLANT,
v. BHAGCHAND MOTIRAM AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1914.

July 31.

Civil Procedure Code (Act V of 1908), sections 11 and 47—Mortgage debt—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of sections 11 and 47 of the Civil Procedure Code (Act V of 1908).

The defendant in a suit for sale under a mortgage-decree, who is given six months' time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property, is not in a position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. If he does not pay within six months and the mortgagee does not apply for decree absolute, the latter does not get rid of the relationship of mortgagor and

* Second appeal No. 261 of 1913.

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mortgagee and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption but he cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt up to the date of that decree.

Such a suit for redemption is not barred either under section 11 or section 47 of the Civil Procedure Code (Act V of 1908).

SECOND appeal against the decision of G. R. Datar, Additional First Class Subordinate Judge of Nasik with appellate powers, confirming the decree of C. G. Khar-kar, Joint Subordinate Judge of Nasik.

Suit to redeem and recover possession.

The property in suit belonged to Chima Bhika Mahar. He mortgaged it to Bhagchand Motiram for Rs. 300 on the 17th June 1890. On the 2nd April 1902 Chima assigned the equity of redemption to Rama *valad* Tulsa Mahar. One Parashram Ramlal obtained a money-decree against Chima in suit No. 229 of 1902 and in execution of that decree the mortgaged property was sold in July 1906. At the auction sale the property was purchased for the mortgagee Bhagchand Motiram by one Shivram Ramlal. Subsequently the mortgagee Bhagchand Motiram brought a suit on the mortgage, No. 44 of 1905, against the mortgagor Chima and Tulsa, father of Rama, the assignee of the equity of redemption and obtained a decree, dated the 25th September 1905, which gave the defendants six months' time to pay the money due under the mortgage and in default the plaintiff was to recover the amount decreed by sale by applying for decree absolute. No further action was taken under the decree

On the 22nd August 1911, Rama Tulsa Mahar, the assignee of the equity of redemption, brought the present suit under the provisions of the Dekkhan Agriculturists' Relief Act for redemption and recovery of possession or in the alternative for recovery of possession.

Defendant 1, Bhagchand Motiram, the mortgagee, answered that Shivram Ramlal purchased the property for the defendant at the auction sale in execution of the money-decree, No. 229 of 1902, and that the plaintiff had no right to sue.

Defendants 2 and 3, the legal representatives of the deceased auction purchaser, Shivram Ramlal, raised the same defence.

Defendants 4 and 5 answered *inter alia* that they were *bonâ fide* purchasers of part of the property and had spent a good deal on the improvements of the land, that they had no knowledge of the mortgage and the assignment to plaintiff, that the notices sent to them of the auction sale were not legal and sufficient, that the mortgage was not subsisting and the plaintiff had no right to sue and that the Court had no jurisdiction to try the suit.

The Subordinate Judge found that the mortgage was not subsisting, that the suit was barred by sections 11 and 47 of the Civil Procedure Code and that the plaintiff had no right to redeem. He, therefore, dismissed the suit relying on *Vinayak v. Dattatraya*⁽¹⁾, *Sita Ram v. Madho Lal*⁽²⁾, *Vedapuratti v. Vallabha Valiya Raja*⁽³⁾ and Gour on Transfer of Property Act, Volume II, paragraph 1983, 3rd Edition.

On appeal by the plaintiff the appellate Court confirmed the decree for the following reasons :—

It is not disputed that the defendant No. 1 had, for recovering the debt due under the mortgage for the redemption of which this suit is, brought suit No. 44 of 1905. In this suit the plaintiff's father himself was a party. A decree was passed in this suit by which the defendants, including the plaintiff's father, were allowed six months' time to pay the money due under the mortgage and in the event of default the plaintiff, *i. e.*, the defendant No. 1 in this suit, was ordered to recover the amount decreed by sale of the mortgaged

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property by applying for making the decree absolute [*vide* exhibits 5 and 30 (a)]. The questions of redeeming the mortgage and of realizing the mortgage debt were thus finally determined in that suit, and they therefore cannot be again tried by a separate suit. The remedy of the plaintiff, if any, for redeeming the mortgage was by paying the decretal debt and thus redeeming the mortgage by satisfying the decree obtained by defendant No. 1. The question of the satisfaction of that mortgage was therefore a question of the satisfaction of that decree, and that could be determined only by the Court executing the decree and not by a separate suit. This suit is therefore barred both under section 11 and section 47 of the Civil Procedure Code. The appellant's pleader relies upon the ruling 24 All. 44, but I think the ruling has no application, because in the present case the decree the effect of which we have to consider expressly directed that if the property was not redeemed as directed, the mortgagee, defendant No. 1, was to recover the debt by sale of the mortgaged property.

The present suit cannot be treated as an application for execution, because the time of six months allowed by the decree for making the payment had long expired before the institution of the present suit and there was no authority given by Rule 5 of Order XXXIV of the Code of Civil Procedure to extend the time. The fact that the defendant No. 1 had never applied to make the decree absolute cannot avail the plaintiff as his only remedy for redeeming the mortgage is not now available for him. His right to redeem the property has thus become practically extinct (13 Bom. 567).

The plaintiff preferred a second appeal.

K. N. Koyaji for the appellant (plaintiff):—The respondent-mortgagee never applied to have the decree nisi for sale made absolute, therefore, the relations of mortgagor and mortgagee have continued up to the present day and there can be no bar to the present suit for redemption. "The estate does not lose the quality of a mortgage until the final order for foreclosure": *Thompson v. Grant*⁽¹⁾; Fisher's Law of Mortgage, 6th Edition, paragraph 1385, page 711.

The present suit is not barred by *res judicata* as we do not seek to go behind the former decree and set up any claim contrary to it.

The suit is also not barred by section 47 of the Civil Procedure Code as the plaintiff was a defendant in the

⁽¹⁾ (1819) 4 Madd. 438.

former suit and was not in the position of a decree-holder who could apply for execution. This is not the case of the plaintiff suing a second time for redemption.

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[Scott, C. J., referred to *Hansard v. Hardy*⁽¹⁾.]

W. B. Pradhan for the respondents (defendants):—The mortgagee having taken possession under the auction sale of 1906, it was not necessary for him to apply for a decree absolute. The present plaintiff was a defendant in the former suit the decree in which operated partially in his favour. He could have executed that decree by paying the mortgage amount within six months. Not having done so, he is barred by section 47 of the Civil Procedure Code. In the former suit redemption was decreed, therefore, the plaintiff is barred by section 11 of the Code and he cannot bring a fresh suit.

SCOTT, C. J.:—The plaintiff claims to be the assignee of the equity of redemption of a certain mortgagor, named Chima, Chima's mortgage having been created on the 17th of June 1890 in favour of the first defendant. The assignment of the plaintiff is dated the 2nd of April 1902. Subsequent to that assignment the Court under a money-decree obtained against Chima in suit No. 229 of 1902 at a Court-sale held in July 1906 put up to sale the right, title and interest of Chima in this property which was attached by the decree-holder in that suit, and at that sale the defendant-mortgagee was declared to be the purchaser.

Prior to that purchase the defendant No. 1 had brought a suit upon Chima's mortgage for sale of the mortgaged property in 1905, and the plaintiff's father, who was Chima's assignee, was joined as a party to that suit. A decree was passed by which the defendants, including

⁽¹⁾ (1812) 18 Ves. 455 at p. 460.

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the plaintiff's father, were allowed six months' time to pay the money due under the mortgage, and in default the plaintiff was to recover the amount decreed by sale by applying for decree absolute. He never applied for sale, but rested content with the title that he was supposed to have acquired as purchaser at the Court-sale held under the decree in the money-suit of 1902.

The plaintiff now brings this suit for redemption of the mortgaged property, but the learned Judge has dismissed his claim on the ground that the time of six months allowed by the decree for making payment of the mortgage claim had long expired, and that this was an application in execution which should have been brought under section 47 of the Civil Procedure Code and that a separate redemption suit could not lie. We are of opinion that the defendant in a suit for sale under a mortgage who is given six months' time to pay the decretal debt is not in the position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. The contention of the defendant would result in this anomalous position that having the right to apply for sale and for decree absolute he abstains from exercising that right, yet nevertheless, after three years have elapsed though he can no longer enforce the decree, he is put in the position of the absolute owner of the property by reason of the defendant in the suit not having elected to pay off the mortgage. We think that if he does not apply for decree absolute he does not get rid of the relationship of mortgagor and mortgagee, and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption. It has been held in England in *Hansard v. Hardy*⁽¹⁾ that a dismissal for want of prosecution of a mortgagor's

(1) (1812) 18 Ves. 455 at p. 460.

action for redemption does not prevent him from bringing a fresh suit for redemption. *A fortiori* we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject however to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree. But it is not contended by the plaintiff in this suit that the mortgage-debt at that time was less than it is found to be by the Court, and therefore, in permitting the present suit, there would be no violation of the provisions of section 11 of the Civil Procedure Code. We reverse the decree and remand the case for disposal on the merits. The plaintiff must have the costs of the two appeals against the opposing defendants.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

TULSIDAS LALLUBHAI (ORIGINAL PETITIONER), APPELLANT, *v.* THE BHARAT KHAND COTTON MILL COMPANY, LIMITED (ORIGINAL OPPONENT), RESPONDENT.*

1914.

August 12.

Indian Companies Act (VI of 1882), sections 128, 129—Company—Compulsory winding up—Creditor's petition—Company's inability to pay its debts.

The petitioner, who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager, demanded payment from the Company. The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The petitioner thereupon applied to the

* First Appeal No. 31 of 1912.

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Court to compulsorily wind up the affairs of the Company. It was not shown that the Company was unable to pay its debt in full. The lower Court having rejected the application, the petitioner appealed :—

Held, that the application was rightly rejected, for the petitioner's object, in making the application, was to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts.

The principle upon which a Company can be wound up on a creditor's application is simply its inability to pay its just debts. The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks. Such neglect must be judged by reference to the facts of each particular case. Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts.

APPEAL from the decision of B. C. Kennedy, District Judge of Ahmedabad.

This was an application by a creditor to wind up the affairs of a Company.

The defendant Company was at first managed by its then agent Kevaldas. He had, during his management, it was alleged, advanced moneys to the Company, for which three deposit receipts were issued : viz., (1) for Rs. 75,812-8-0 in the name of Bai Dhiraj, wife of Kevaldas ; (2) for Rs. 50,000 in the name of Bai Mangu, daughter-in-law of Kevaldas ; and (3) for Rs. 11,605-2-8 in the name of Kevaldas. The debts due on these receipts were assigned to the petitioner in April 1912. In October of the same year, the petitioner demanded payment of the debts from the Company ; but the Company replied saying that the debts were not genuine.

The petitioner thereupon applied to the District Court at Ahmedabad to have the affairs of the Company wound up.

It was not shown that the Company was unable to pay the debts in question.

The District Judge did not conduct the inquiry but dismissed the application on the following grounds :—

The applicant and Kevaldas who is the moving spirit in this application wish me to read section 129A as if the words were " the Company has failed or omitted to pay ". But the words are " neglected to pay ". The expression " neglected " connotes illegal failure to pay. It is not illegal to refuse to pay a debt which is not due or against which the debtor has a set-off. I think then that where a Company denies the existence of the debt or claims a set-off and for that reason neglects to pay a claim it cannot be said to contravene the duty imposed on it indirectly by section 129. To read the section as the applicant wished me to read it would have very serious consequences. All sorts of fictitious and blackmailing claims might be raised against a Company and payment extorted from it under threat of shattering its credit and impeding its operations by applying to the Court for a winding-up order.

I think then that on the pleadings, the case should not proceed.

The applicant however urges that mere statement by the Company that it does not admit the debt and that it has counterclaims is not sufficient and that I ought to frame issues as to whether that defence is made *malu fide* and whether there is actually any defence to the applicant's claim.

This I think I am not bound to do. It seems to me that I should have to plunge into a very lengthy and purposeless investigation which would, if eventually I held the defence to be *bond fide*, have caused the very mischief which this sort of application is intended to cause, namely keeping liquidation proceedings hanging over the Company for an indefinite time and that if I held the defence to be *malu fide* I should simply have removed a question between parties from the cognizance of the ordinary tribunals and enforced a claim by the threat of these special proceedings under the liquidation chapters instead of allowing it to be recovered by the ordinary procedure. This appears to me to be a thoroughly vicious procedure and without authority. I will not adopt it.

If the applicant has a claim against the Company which the Company denies, it is his business to get a decree in the ordinary way in the ordinary Courts.

It is not alleged by the applicant that the Company could not pay this claim if found due. The defence if proved appears good, whether it is true or whether the Company can prove it, is, I think, not a matter for this Court in these proceedings.

The petitioner appealed to the High Court.

G. S. Rao, with M. K. Mehta, for the appellant.

B. J. Desai, with D. A. Khare, for the respondent.

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A preliminary objection was raised that no appeal could lie against an order refusing to wind up the affairs of a Company.

Desai, in support of the preliminary objection:—Section 169 of the Indian Companies Act, 1882, provides for appeal from an order passed in the matter of winding-up of a Company. It does not refer to orders refusing to wind up the Company.

Rao :—The appeal is perfectly competent. See *In re Great Britain Mutual Life Assurance Society*⁽¹⁾.

[The Court overruled the preliminary objection.]

Rao :—Before dismissing our petition, the lower Court should have held an inquiry as to whether the contention raised by the Company was *bona fide* or not. See *In re King's Cross Industrial Dwellings Company*⁽²⁾ and *In re Great Britain Mutual Life Assurance Society*⁽¹⁾; Lindley on Companies, Vol. II, p. 862 (6th Edn.).

Desai was not called upon.

BEAMAN, J. :—The petitioner-appellant is assignee of certain debts alleged to be due by the defendant Company to its late Secretary and Manager, Mr. Kevaldas, and his benamidars, his wife and daughter. The petitioner-appellant gave the Company notice on the 7th of October 1912 and demanded payment. On the 24th of October 1912 the Company replied in a rather vaguely worded letter, the general content of which, however, clearly indicates the line of defence subsequently adopted by the Company. On the 15th of November the petitioner, instead of accepting the Company's challenge and bringing a suit to vindicate the justice of his demand, put in a winding-up petition. This came on before the District Judge, and the Company replied in effect that the alleged demand

⁽¹⁾ (1880) 16 Ch. D. 246.

⁽²⁾ (1870) L. R. 11 Eq. 149.

was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The matter appeared to the learned District Judge to be one of great complexity, and we think that in declining to go into it upon this petition he acted upon sound and correct principle. We are not afforded any assistance by such cases as *In re King's Cross Industrial Dwellings Company*⁽¹⁾ and *In re Great Britain Mutual Life Assurance Society*⁽²⁾. The dicta of Jessel, M. R., in the latter case certainly appear to be rather widely and loosely expressed, but in no case could such general dicta be carried further than the facts of the case would warrant. If any general rule is to be laid down at all, it is easily obtained from the Statute law. The principle upon which a Company is to be wound up, for all the purposes with which we are now concerned, is simply its inability to pay its just debts, and that inability is said to be indicated by its neglect to pay after proper demand made and the lapse of three weeks. It is quite clear, however, that any such neglect must be judged by reference to the facts of each particular case, and that, where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts. In this case it is perfectly clear that the defence, whatever its ultimate result may be, has substance in it, for it is hardly even the petitioner-appellant's case that the Company is unable to pay the debt it owes him. It has been stated here that he expects to obtain all his dues in full in the liquidation. Thus, therefore, it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon the Company in

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⁽¹⁾ (1870) L. R. 11 Eq. 149.⁽²⁾ (1880) 16 Ch. D. 246.

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order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our Statute law upon Companies could be perverted. We are clearly of opinion that the learned Judge below was right, and that his order ought to be confirmed and this appeal dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1914.
August 18.

NATHABHAI TRICAMLAL (ORIGINAL PLAINTIFF), APPLICANT, v.
RANCHHODLAL RAMJI (ORIGINAL DEFENDANT No. 2), OPPONENT.*

Indian Contract Act (IX of 1872), sections 134, 137—Suit against principal and surety—Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908), Order IX, Rule 5, Order XXIII, Rule 1.

A suit was brought in 1913 on a promissory note passed in 1912 by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1 : his name was therefore struck out and the suit proceeded against defendant No. 2 alone. The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No. 1's) name struck out, the surety also was thereby discharged. On plaintiff's application under extraordinary jurisdiction :—

Held, reversing the decree and remanding the suit, that the mere omission of the plaintiff to pursue his suit against one of the defendants, with the result that that defendant's name was struck off and the suit dismissed against him under Order IX, Rule 5, of the Civil Procedure Code (Act V of 1908), did not discharge the surety, provided the suit was still in time against the principal.

* Civil Application No. 119 of 1914 under extraordinary jurisdiction.

APPLICATION under civil extraordinary jurisdiction from the decision of G. V. Saraiya, Judge of the Court of Small Causes at Ahmedabad.

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The plaintiff sued in 1913 on a promissory note for Rs. 250, dated the 23rd October 1912, which was signed by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1. His name was, therefore, struck out at plaintiff's instance.

The surety (defendant No. 2) thereupon applied that the suit against him be dismissed, for as the principal debtor was discharged by an act of the creditor, his (the surety's) liability had come to an end.

The learned Judge held that the surety was discharged from liability under section 134 of the Indian Contract Act owing to the act of the plaintiff which led to the discharge of the principal debtor from the suit. The suit was dismissed.

The plaintiff applied to the High Court under extraordinary jurisdiction.

T. R. Desai, for the applicant :—Summons could not be served on defendant No. 1. The plaintiff therefore took action under Order IX, Rule 5, of the Civil Procedure Code, elected to drop the name of the principal and to proceed against the surety alone. A dismissal of a suit under these circumstances does not bar a fresh suit. There is thus no discharge of the principal and section 134 of the Indian Contract Act has no application. Further section 134 should be read subject to section 137. See *Hajarimal v. Krishnarav*⁽¹⁾ and *Krishto Kishori Chowdhraïn v. Radha Romun Munshi*⁽²⁾. See also *Shaik Alli v. Mahomed*⁽³⁾.

(1) (1881) 5 Bom. 647.

(2) (1885) 12 Cal. 330.

(3) (1889) 14 Bom. 267.

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Ratanlal Ranchhoddas, for the opponent :—The act of the plaintiff in having the name of defendant No. 1 struck out fell under Order XXIII, Rule 1, of the Civil Procedure Code. If so, he cannot bring a fresh suit against the principal debtor. This discharge of the principal debtor involved also the discharge of the surety. Section 137 of the Indian Contract Act is an independent provision and is by no means a corollary to section 134. We rely on *Hazari v. Chunni Lal*⁽¹⁾, *Radha v. Kinlock*⁽²⁾ and *Ranjit Singh v. Naubat*⁽³⁾.

BEAMAN, J. :—The plaintiff sued the two defendants on a promissory note. The second defendant pleaded that he was a surety. There was some difficulty in serving the first defendant, and we gather from the record that his name was struck out. As a year had not elapsed, presumably this was done, if not at the request, at least with the consent of the plaintiff. The defendant No. 2 then contended that as the act of the plaintiff in having the defendant No. 1's name thus struck off operated as a complete discharge of the principal debtor, he, the surety, was likewise discharged and the suit must be dismissed.

The learned Judge who tried this suit as a Small Cause Court suit was of opinion that this contention was sound and dismissed the plaintiff's suit.

We think that the striking off of the defendant No. 1's name was a procedure under Order IX, Rule 5, rather than Order XXIII, Rule 1. And all the authorities in all the Courts of India who have had this question under consideration, although they differed upon another point, are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name

⁽¹⁾ (1886) 8 All. 259.

⁽²⁾ (1889) 11 All. 310.

⁽³⁾ (1902) 24 All. 504.

is struck off and the suit dismissed against him under Order IX, Rule 5, does not discharge the surety, provided the suit be still in time against the principal. That being so, and confining our decision to that ground alone, we think that the order of the learned Judge below dismissing the suit was wrong.

Even were that not so, it would still be a question whether, in view of the form of the suit, the Judge ought to have taken it for granted, as he appears to have done, that the plaintiff was suing the second defendant merely as a surety. If, in fact, he was suing him as a principal, none of these considerations upon which the dismissal of the suit has been based would apply at all.

We must, therefore, reverse the decree of the learned Judge below and remand the case to him for trial upon the merits.

Costs will be costs in the cause.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

VENKAJI NARAYAN KULKARNI AND OTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. GOPAL RAMCHANDRA DESHPANDE (ORIGINAL
PLAINTIFF), RESPONDENT.*

1914.

August 19.

Mortgage—Equity of Redemption—Extinguishment—Mortgagor passing a rajinama to mortgagee for the land—Mortgagee executing kabulayat to pay Government assessment.

In 1876, the plaintiff mortgaged the land in dispute to the defendants; and in 1879 passed a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a comple-

* Second Appeal No. 368 of 1913.

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mentary *kabulayat* agreeing to pay Government assessment on the land. The plaintiff having sued to redeem the mortgage,

Held, dismissing the suit, that the *rajinama* and *kabulayat* effectually extinguished the plaintiff's equity of redemption.

SECOND appeal from the decision of L. C. Crump, District Judge of Belgaum, reversing the decree passed by K. R. Natu, Subordinate Judge at Athni.

Suit to redeem a mortgage.

The mortgage in question was passed in 1876 by the plaintiff's father to the defendants. Under its terms the mortgagees were to enjoy profits in lieu of interest and the mortgagor was to pay Government assessment of the land.

In 1879, the plaintiff executed a *rajinama* to the defendants making over to them the right of occupancy in the land. At the same time, the defendants executed to the plaintiff a *kabulayat* agreeing to pay Government assessment in respect of the land.

The plaintiff sued in 1909 to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act.

The Subordinate Judge dismissed the suit, holding that the transaction of 1879 effectually transferred the equity of redemption to the defendants.

On appeal the District Judge held that the transaction of 1879 did not operate as a transfer of the equity of redemption. He, therefore, reversed the decree and ordered the appeal to be set down for hearing on merits.

The defendants appealed to the High Court.

Coyaji, with *G. K. Parekh*, for the appellants.

G. S. Rao, for the respondents.

BEAMAN, J.:—The plaintiff in this suit mortgaged the land to the defendants in 1876, and in 1879 he passed

a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The defendants at the same time gave the complementary *kabulayat*. The trial Judge held that this transaction amounted to a relinquishment of the equity of redemption by the mortgagor in favour of the mortgagees. The learned Judge of first appeal has held that it did not. In his opinion the only effect of the *rajinama* and *kabulayat* under the Act of 1865 was to confer upon the mortgagees the privilege, as the learned Judge calls it, of paying the Government assessment. We find it a little difficult to understand in what light this could have appeared to the learned Judge a privilege for which any person would be anxious to pay good consideration. However that may be, on the facts found by the learned Judge of first appeal, the case is clearly covered by authority. The judgment of this appeal Court in *Dagadu v. Sakharam*⁽¹⁾, following *Vishnu Sakharam Phatak v. Kashinath Bapu Shankar*⁽²⁾ and *Tarachand Pirchand v. Lakshman Bhavani*⁽³⁾, appears to us to have settled the law beyond controversy upon the only question we are asked to answer. In our

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(1) The following judgment was delivered by Scott, C. J., and Batchelor, J., on the 25th February 1914 in appeal No. 12 of 1912 from order :—

SCOTT, C. J. :—In this case we have no doubt that the *rajinama* and the *kabulayat* (assuming that we cannot look at the document Exhibit 37 which was contemporaneous with them) operate to transfer the equity of redemption to the mortgagee in whose favour the Court had found that a sum of money was payable by the mortgagor. The case is not distinguishable from *Tarachand Pirchand v. Lakshman Bhavani*⁽³⁾ and *Vishnu Sakharam Phatak v. Kashinath Bapu Shankar*⁽²⁾. The words are apt to declare the relinquishment of all the right of the mortgagor in favour of the mortgagee, and the transaction was such as was contemplated by the terms of the old section 74 of the Land Revenue Code. We reverse the order of the lower appellate Court and restore the decree of the Original Court with costs throughout upon the plaintiffs.

(2) (1886) 11 Bom. 174.

(3) (1875) 1 Bom. 91.

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opinion the *rajinama* and the *kabulayat* of the year 1879 effectually extinguish the plaintiff's equity of redemption. We must, therefore, now reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with all costs upon the respondent throughout.

Decree reversed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Heaton and Mr. Justice Shah.

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March 9.

EMPEROR v. HANMARADDI BIN RAMARADDI.*

Criminal Procedure Code (Act V of 1898), section 162—Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872), section 157.

During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed. When examined before the committing Magistrate, she denied the presence of the boy at the scene of the offence. At the trial before the Court of Session, she admitted the presence of the boy. The statement that the witness had made in the investigation was sought to be proved at the trial by the oral deposition of the police officer to whom it was made. The defence objected to this deposition on the ground that it offended against the provisions of section 162 of the Criminal Procedure Code. The Sessions Judge overruled the objection and let in the evidence. The accused having appealed,

Held, that the police officer could be allowed to depose to what the witness had stated to him in the investigation, for the purpose of corroborating what she had said at the trial.

APPEAL from conviction and sentence recorded by E. H. Leggatt, Sessions Judge of Dharwar.

The facts were that, on the 20th August 1913, one Rama Valikar and his wife Honnava started from Makrabi to Haveri. They were later on joined by the accused, who was intimate with Honnava. The party rested for

* Confirmation Case No. 3 of 1914: Criminal Appeal No. 42 of 1914.

their meals on the way, at the Haleritti *nalla*. They finished their meals; and while they were resting, the accused attacked and killed Rama. The accused then dragged the body of the deceased and concealed it in a bush near the *nalla*. This was seen by a Kurbar boy named Gudda.

The accused was tried by the Sessions Judge for the murder of Rama. Gudda was examined as a witness. He deposed to having seen the accused dragging the body of the deceased to the *nalla*.

At the investigation into the case Honnava stated to the police officer that she had seen the Kurbar boy Gudda at the scene of the offence. This statement was reduced to writing. Before the committing Magistrate, however, she denied having seen the Kurbar boy at the time. In her deposition at the trial before the Sessions Court she again reverted to her first statement and deposed thus: "The accused then dragged my husband's body towards the *ketki* bush. At that time I saw a boy from Haleritti. He stood there and then got frightened and ran away."

The investigating police officer was also examined as a witness at the trial. He deposed as follows to the statement made by Honnava about the Kurbar boy in the investigation carried on by him: "Honnava did tell me that when her husband's body was being dragged along a boy came to the *nalla* for water but being frightened he ran away." The defence objected to this evidence on the ground that it was inadmissible under section 162 of the Criminal Procedure Code. The learned Sessions Judge allowed the evidence to go in on the following grounds:—

The Public Prosecutor wishes to elicit from the witness a statement made to him by one of the witnesses in the course of the investigation for the purpose of corroborating the statement of the witness before this Court. Mr. Bellary objects that the statement is inadmissible under section 162, Criminal Procedure

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Code. He refers to 12 Bom. L. R. 663, I. L. R. 22 Bom. 596 and 32 Bom. 111. The Public Prosecutor relies on I. L. R. 36 Cal. 281.

Ruled that the statement is admissible. The case of *Emperor v. Akbar Badu* (12 Bom. L. R. 663) differs, as the question there was whether such a statement could be used to corroborate, not the statement of the witness in the Sessions Court, but the statement of the witness before the committing Magistrate. But one passage in the judgment is significant. It runs: "Only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Evidence Act. Previous statements may be used to corroborate or contradict statements made at the trial, not to corroborate statements made prior to the trial." Therefore, as the statements were not admissible under section 157 of the Evidence Act, they could only be admitted under section 162, Criminal Procedure Code. But this latter section only provides for the admission of such statements on behalf of, and not against, the person under trial. The case of *Imperatrice v. Jijibhai Govind* (I. L. R. 22 Bom. 596) does not apply, as in that case it is clear that the writings had been admitted as evidence. In *Emperor v. Narayan Raghunath Patki* (I. L. R. 32 Bom. 111) the question has been discussed, but one Judge was of opinion that the statement could be used by the prosecution by way of corroborating a witness, while another Judge was of opinion that the statement could only be used on behalf of the accused and for the purpose of impeaching the credit of the witness, though both these Judges, and all other Judges of the Full Bench, were agreed that the *writing* could not be used at all. It is to be noted that in that case the question really before the Court was simply whether the writing could be used. The point, however, was directly raised and decided in *Fanindra Nath Banerjee v. Emperor* (I. L. R. 36 Cal. 281), where it was held that oral evidence of such a statement was admissible to corroborate the witness' deposition at the trial. I am of opinion that it is only the writing itself the use of which is prohibited by the section, and that the proviso is intended to be nothing more than a proviso to that prohibition. The police papers not being available to the defence they are merely given the right to ask the Court to refer to the writings and to decide whether the accused could have a copy, in which case the statement, *not the writing*, may be used to impeach the credit of the witness. The latter part of the proviso is co-extensive with the former part, and as the former does not refer to the prosecution, who already have access to the papers, the latter part of the proviso is necessarily confined to the defence, but this does not appear to me to have any effect on the use that they may be made of such statements by either the defence or the prosecution. The defence may know what a witness had said to the police and may ask the police for proof thereof without any reference to any writing and may use the statement to impeach the credit of the witness. Similarly, the prosecution may know, as they

usually do know, what a witness had said to the police and may require the police to prove what the witness had said and may use that statement by way of corroboration of the witness' statement at the trial. In such a case too it would not be necessary to refer to the writing at all unless the witness wished to refresh his memory and recourse to the section would be needless. The section seems to me to be intended only to restrict within narrow limits the use of the *writing*. The evidence is therefore allowed.

The learned Judge relied on the evidence of Gudda the Kurbar boy as establishing the identity of the accused, convicted him of the offence of murder, and sentenced him to be hanged.

The accused appealed against the conviction and sentence. The case also came up before the High Court for confirmation.

Velinkar, with *V. V. Bhadkamkar*, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

HEATON, J. :—A certain Hanmaraddi has been convicted of the murder of Rama Valikar and has been sentenced to death. The case comes before us for confirmation of that sentence and also on the appeal of the convict.

It appears that about the 22nd of August 1913 the corpse of a man, whose head was almost severed from his body, was found in the village of Haleratti. On making inquiries the police discovered from the neighbouring villagers that the murdered man had been accompanied by another man and a woman. They were all strangers to that locality. Neither the identity of the murdered man nor that of his companions was at the time ascertained. About a month later, however, the identity of the murdered man came to be suspected. His wife was questioned and thereafter the police were enabled to make complete inquiries. They discovered that the murdered man was one Rama and that his companions were the accused and the deceased's wife Honnava. It was found that Honnava had for some

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time been living at Makrabi where the accused also lived, that her husband had been working at another village Magal, that he had taken his wife from Makrabi for a time and that thereafter he and his wife set out to go to Haveri and were joined on the way by the accused. On their journey these three persons crossed the ferry between Bannimatti and Galagnath, whence they proceeded to the place where the corpse was subsequently found. From there Honnava and the accused returned, spending the night at a village on the way and recrossing the ferry on the following day. This gave the police an opportunity of which they availed themselves of tracing the movements of these persons and identifying the individuality of each. They have been enabled to put before the Court perfectly credible evidence of all the circumstances that I have stated. Then there is the evidence of the dead man's wife Honnava, who describes how her husband was murdered. It is said that she is an accomplice witness. However that may be, we must, in a case of this kind, regard her evidence with caution, because, whether an accomplice or not, she was present at the murder and for weeks thereafter she gave no information about the crime, and it is proved that she had illicit intimate relations with the accused. It does not seem to me to matter in the least whether you call her an accomplice or not. Her evidence must be valued in relation to these circumstances. However, in the light of the surrounding circumstances, from the undoubted truth of the facts that the three persons travelled together, that one of them was left dead where his body was found and that the other two returned to their village together, there can be little doubt that the man was murdered by one or both of them. This conclusion is fortified by the subsequent conduct of the accused himself who gave an untrue

account of his proceedings and had two letters written at intervals of about a fortnight which were designed to induce people to believe that the murdered man was still alive and working in a distant village. Here, again, the evidence is, to my mind, credible and indeed convincing. Taking the circumstances as a whole, they leave no doubt whatever that the accused was the man, whether helped by the woman or not it does not matter, who killed Rama.

The credit of the elucidation of these circumstances is mainly due to the promptness and intelligence of the police inquiry, and for that inquiry, I gather, Balwant Vyankatesh, Sub-Inspector of Haveri, is mainly responsible.

For these reasons I confirm the conviction and also the sentence in this case.

There has arisen and has been discussed a point as to the meaning of section 162 of the Criminal Procedure Code. It appears that amongst the villagers who were near the scene of the offence when the murder took place was a boy who happened to see the three persons. The deceased's wife before the committing Magistrate stated that she had not seen this boy. Before the Sessions Court she stated that she had seen him. On this state of facts the defence might very easily and with no other facts bearing on the point known, with some force argue that the woman had changed her story, that the earliest known account of the matter which she gave was less favourable to the prosecution case than that she gave to the Sessions Court and thereon they might very properly found an argument that the witnesses had been tampered with and that the case presented clear indications of that kind of influence which properly ought to raise doubts in the mind of the trying Judge. To rebut an argument of this kind it was proved from the mouth of the

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investigating police officer that to him the deceased's wife had said that she saw the boy. If what the investigating police officer says be true, then it completely destroys the defence argument. The question argued before us is, whether the police officer could, as the law stands, be allowed to depose to what this woman had said to him for the purpose of corroborating what she said before the Sessions Judge. My own opinion is that the police officer could depose to that effect. I do not propose to discuss the various authorities which have been referred to. Lengthy arguments on this very point find a place in the books. I will only say that I do not think that either by its terms or by its intention section 162 of the Criminal Procedure Code prohibits the Court from receiving such evidence for such a purpose.

SHAH, J. :—I concur. The learned Sessions Judge has examined the evidence with great care in an exhaustive judgment and has considered all the arguments urged in favour of the defence. Substantially the same arguments have been urged before us. Generally speaking I agree with the lower Court in its appreciation of the evidence and with the inferences drawn by it.

It is not disputed before us that the deceased whose body was found on the 22nd August last was Rama, the husband of Honnava, and the evidence in the case clearly establishes the fact.

I accept the evidence of Honnava and Gudda as true in the main. Honnava's evidence, no doubt, must be received with caution, though I do not accept the argument that she is an accomplice. She did not give out her present story soon after the occurrence and gave varying accounts from time to time, which was to a certain extent natural under the circumstances. Having regard to the proved circumstances in the case,

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I am inclined to believe her present account that she saw the accused killing the deceased. As to the evidence of Gudda, quite apart from the fact whether he was seen by Honnava or not, I accept it as true, despite the criticism of Mr. Velinkar on his evidence. The fact of the journey of the deceased and Honnava in the company of the accused is proved by reliable evidence in the case. The subsequent conduct of the accused, which I do not propose to examine in detail, lends strong corroboration to the prosecution story. It is enough to refer to his association with the letters, Exhibits 27 and 28. The accused is proved to have taken those letters to Satyava, which appear on the evidence to have been written at his instance. It is proved that the deceased was never at Amlikop. The obvious inference that arises from the proved conduct of the accused is that he was trying to conceal the death of Rama, which was known to him. On a careful consideration of the evidence and the arguments advanced on behalf of the accused, I have no hesitation in coming to the conclusion that the deceased Rama was murdered by the accused. The circumstances connected with the crime demand that the sentence should be confirmed.

The police investigation in this case appears to me to have been made with unusual ability and thoroughness, and affords a telling illustration of the manner in which a case could be investigated without the aid of a confession.

I desire to allude to a point which has been raised before us in connection with Honnava's evidence. It has been pointed out that though she stated before the committing Magistrate that she did not see any Kurbar boy then, she now denies having made that statement, and says that she had seen a boy from Haleritti. It is

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urged that the statement before the committing Magistrate represents the truth. Even then I do not think that the main conclusion in the case is affected in any way. It is urged on behalf of the prosecution, however, that the argument is based upon a misapprehension of facts, and that the Sub-Inspector has been examined to show that Honnava stated before the police that she did see a boy at the time. The question of law that arises is whether the prosecution can be allowed to adduce oral evidence in proof of her statement before the police in order to corroborate her testimony at the trial. Her statement to the police was admittedly reduced to writing, and it is common ground that such writing cannot be used as evidence. Mr. Velinkar contends, and not without force, that it would be unreasonable to allow any oral evidence of the statement to be given, when the writing containing the statement cannot be proved. On the other hand, it is argued on the strength of section 157 of the Evidence Act that the right of the prosecution to prove any statement to corroborate the testimony of any witness under that section is not taken away by section 162 of the Code of Criminal Procedure, which only provides that the writing shall not be used as evidence. The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions bearing on the question. The judgment of Knox J. in *Rustam v. King-Emperor*⁽¹⁾ and the observations of Beaman J. in *Emperor v. Narayan*⁽²⁾ represent one side of the question and the judgment of Karamat Hosain J. in the case of *Rustam v. King-Emperor*⁽¹⁾ and the decisions in *Funindra Nath Banerjee v. Emperor*⁽³⁾, *King-Emperor v. Nilakanta*⁽⁴⁾ and *Muthu-*

(1) (1910) 7 A. L. J. 468.

(2) (1907) 32 Bom. 111.

(3) (1908) 36 Cal. 281.

(4) (1912) 35 Mad. 247.

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kumaraswami Pillai v. King-Emperor⁽¹⁾ represent the other side. I have carefully considered the question, and on the whole I incline to the view that looking to the plain language of section 162, Criminal Procedure Code, the *writing* only is excluded from evidence but the right to prove any *statement* made to the police by oral evidence to corroborate the testimony of any witness is not taken away by that section. This conclusion derives support from, or is at least in consonance with, the view taken by this Court in *Emperor v. Balaji*⁽²⁾ in which the Court, while directing a re-trial, ordered that the chief constable should be examined as to the statements made to him by the witnesses during the police investigation. Such an order would be inappropriate, if the oral evidence of the statements were inadmissible. The anomaly, if any, can be remedied by the Legislature. Our duty plainly is to construe the section without unduly straining the language used by the Legislature. I think, therefore, that the evidence of the Sub-Inspector was rightly admitted on this point. At the same time, I think that under ordinary circumstances the admission of the oral evidence of the statements made to the police when they are reduced to writing is not in keeping with the spirit of section 162, Criminal Procedure Code, and the existence of exceptional circumstances would be absolutely necessary to give any appreciable value to such evidence. In this case, for instance, Honnava's statement in question at the trial deserves to be credited, not simply because the Sub-Inspector says that she had made a statement to that effect to him, but mainly on the additional ground that though it was suggested in her cross-examination that she had made a contradictory statement before the committing Magistrate, it could not be suggested to her that her earlier statement to the police

⁽¹⁾ (1912) 35 Mad. 397.⁽²⁾ (1907) 9 Bom. L. R. 366.

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on this point was in conflict with her present version, and that the Sessions Judge did not ask her any question on this point, though she was re-called on the 8th January, after the Sub-Inspector was examined and questions on other points, arising out of her statement reduced to writing before the police, were put to her by the Court.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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July 28.

YELLAVA SAKREPPA BARKI (ORIGINAL DEFENDANT), APPELLANT, v.
BHIMAPPA GIREPPA DESAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Grant of land—Grant for Barki service—Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.

In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right.

SUIT in ejectment.

The plaintiff, an inamdar, owned certain Deshgat Vatan lands. Sometime before 1853, a predecessor of his granted them to defendant's brother for Barki services, which consisted in sweeping the floors and lighting the lamps of the plaintiff's family house.

In 1909, the plaintiff elected to discontinue the services and resume the lands. He sued the defendant in ejectment.

* Second Appeal No. 678 of 1913.

The Subordinate Judge dismissed the suit in absence of evidence to show "that the grant was accompanied by the condition that when the services would no longer be required, defendants' interest in the lands would also cease".

This decree was reversed, on appeal, by the District Judge who held that the plaintiff was entitled to resume the lands on the ground that the Barki services were no longer required.

The defendant appealed to the High Court.

K. H. Kelkar, for the appellant :—We are in possession of the land for a very long time ; and rely on section 83 of the Bombay Land Revenue Code. See *Lakshman v. Vithu*⁽¹⁾. In cases like the present, the plaintiff must prove that he has resumed a right which can be resumed. See *Lakhamgavda v. Keshav Annaji*⁽²⁾. We have been refused to perform the services.

Campbell, with *A. G. Desai*, for the respondent :—The grant in the present case being of a purely personal nature can be resumed at grantor's choice. See *Radha Pershad Singh v. Budhu Dashad*⁽³⁾, *Sanniyasi v. Salur Zamindar*⁽⁴⁾, *Mahadevi v. Vikrama*⁽⁵⁾. In the case of *Lakhamgavda v. Keshav Annaji*⁽²⁾, the distinction between grants of a public and private nature was probably not pressed on the attention of the Court.

It is incorrect to rely on the principles of a grant in such cases. The defendant is more a tenant than a grantee (section 105 of the Transfer of Property Act), the presumption being that she is an annual tenant (section 106). The defendant has neglected to perform the services and we are entitled to resume.

HEATON, J.:—In this case the plaintiff sued to recover possession of certain lands. It has now been established

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(1) (1893) 18 Bom. 221.

(3) (1895) 22 Cal. 938.

(2) (1901) 28 Bom. 305.

(4) (1883) 7 Mad. 268.

(5) (1891) 14 Mad. 365.

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as a fact in the case that the lands belonged to the Deshgat Watan of the plaintiff's family and were granted to the defendant's family for service, and it has further been found by the Court of first appeal that, if I understand the judgment aright, this grant must in all probability have been made sometime subsequent to the year 1853. The first Court came to the conclusion that the plaintiff, the inamdar, had no right to resume the lands in the circumstances appearing in this case and it rejected the claim with costs. On appeal the District Judge came to the conclusion that the plaintiff had the right to dispense with the services and to resume the lands.

The case has been fully argued. The facts such as they are have been found by the Court of first appeal and we have to deal with these facts as the basis of an inference. But, first of all, I will deal with a question which has been a good deal argued in the case and it is this. It is said that where, as here, there is a grant of land for services and where those services are, as here, personal services, then the grantor has, under, what may be called, the common law of the country, the right to dispense with the services and resume the lands. We have no authority to this effect in any Bombay case to which we have been referred, but, as to the law in Bengal, we have the case of *Radha Pershad Singh v. Budhu Dashad*⁽¹⁾ and possibly the law is the same also in Madras. But whilst it appears that in Bengal the distinction between a grant for services of a public nature and one for services private or personal to the grantor, is well understood; and though in the case of these private or personal services there is in Bengal presumably a right to dispense with the services and resume the land, it does not follow that it is so in Bombay. In our Presidency the trend of decisions and

(1) (1895) 22 Cal. 938.

what I may describe as the tone of thought in this Court, have always been in the direction of, within reason, protecting the rights of the occupants of lands and not increasing and exaggerating the rights of the inamdar or zamindar or whatever he may be termed. I think that the Bombay cases do undoubtedly disclose a reluctance to presume a right to resume lands where resumption involves ejectment. The tendency is to require that it should be an inference from facts proved in the case and not a mere presumption arising out of the circumstance that there is a grant and that the grant is for personal services. Moreover the judgment in the Calcutta case itself shows that even there the Judges considered very carefully the circumstances of that particular case and that the presumption which they mentioned was used not as a conclusive way of deciding the case but rather as an aid to them in dealing with the circumstances which were proved. For the reasons that I have given, I find myself entirely unable to presume that in this Presidency where there is a grant of land even for personal services, it is at the option of the grantor to determine the services and thereupon to resume the land. It seems to me that if a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant, as here, are unknown, that the proved circumstances justify an inference that he has that right. That is the principle which, I think, ought to be applied here. This is the view which the District Judge took, as I understand his judgment, and very properly took. But where he went wrong, and I think he did go wrong, was in coming to the conclusion that the proved circumstances do justify the inference that there is a right to resume.

In dealing with the proved circumstances—and they are very clearly set out in the District Judge's

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judgment—we have to remember that there are two alternative theories. The first is the theory of the plaintiff which, put in common every day language, is this that the grantor in giving the lands to the grantee said “You may hold these lands so long as I require service from you.” The other theory—that which is set up by the defendant grantee—is this; that what the grantor said was “these lands are yours, but so long as I require them of you, you must render me these services.” We have to decide, or rather the District Judge had to decide, whether the proved circumstances did definitely favour one theory rather than the other. The circumstances are that there was a grant for service, but in all probability the grant was made subsequent to 1853. There is no written record of the grant; there is apparently no entry anywhere in the village books which evidences it; the lands have been held continuously since the grant by the grantee or his successors; services of a purely personal, indeed of a domestic, nature have been rendered. Those, I think, are all the circumstances which have been proved. What the Judge asked himself was this: “do they indicate a grant burdened with services or a mere grant in lieu of wages.” Even taking that as the question rather than the one which I myself have stated, I should say that the proved circumstances do not in any way whatever suggest that it was a grant in lieu of wages rather than a grant burdened with services. And where that is the state of things, where the circumstances do not in any way in any perceptible degree incline to one theory rather than the other, then I say that there is no evidence of either theory. This is a case therefore which in my judgment the District Judge has decided on no evidence. That being so, as a matter of law we are bound to set aside his decision. It comes to this, therefore. We know that there was a grant for service and we know now in the view of the

law which I have stated that the plaintiff has not a right to resume these lands merely because he chooses to dispense with the services.

There then remains the question : Has the defendant in fact refused to render service. On this point there is no finding by the District Judge, for he deemed it unnecessary to find on it. Therefore under the law as it now stands, because we think it was incumbent on the District Judge to find on this issue, it is for us to look into the evidence and to come to a finding on it for ourselves. We have looked into the evidence and we are satisfied that it cannot be said that it is proved that the defendant in fact refused to render service.

Therefore the plaintiff has failed to make out any just or legal ground for ejecting the defendant from these lands. Consequently the decree of the Court of first appeal must be reversed and that of the Court of first instance restored.

The appellant here should have her costs in the Court of first appeal and in this Court.

SHAH, J. :—I concur.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

LAXMANDAS HARAKCHAND (ORIGINAL DEFENDANT), APPELLANT, v.
BABAN WALAD BHIKARI (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhani Agriculturists' Relief Act (XVII of 1879), sections 13, 15D and 16—Monetary dealings, mortgages and promissory notes—Suit for general account and redemption—One general account of mortgage and promissory note transactions—Mortgages found to be satisfied—Surplus profits under mortgage transactions applied in reduction of the claim on promissory notes—Provision of the

* Appeal No. 166 of 1913.

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August 7.

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Dekkhan Agriculturists' Relief Act (XVII of 1879) for two different classes of suits for account by agriculturists—Sections 15D and 16 of the Act—Mortgage account entirely separate from the promissory note account—Mortgagee not accountable for surplus profits under mortgage transactions.

In a suit for general account under the Dekkhan Agriculturists' Relief Act (XVII of 1879) and for redemption of mortgaged property, the plaintiff combined his claim for account of the mortgage transactions with his claim for an account of moneys lent upon promissory notes. In taking an account, the Court made up one general account of the mortgage transactions and the promissory note transactions and having found that the mortgages were satisfied, applied the profits subsequent to the date of the satisfaction of the mortgage debts in the account in reduction of the amount due to the defendant on the promissory notes.

Held that the account could not be accepted.

The Dekkhan Agriculturists' Relief Act (XVII of 1879) has made provision for two different classes of suits for account by agriculturists. Section 15D of the Act relates purely and exclusively to mortgage transactions. Under that section the plaintiff-agriculturist may have either a declaration of the amount due or he may combine a declaration of the amount due with a decree for redemption. Section 16 of the Act entitles the plaintiff to sue for a general account of money dealings between him and the lender and for a bare declaration of the amount due without any relief being claimed. Thus the two sections where accounts are contemplated stand on a different footing. Under the Act the mortgage account must be treated as entirely separate from the promissory note account so that the lender mortgagee would not be accountable for surplus profits received by him after the date when the mortgage claims were satisfied.

Janoji v. Janoji⁽¹⁾ and *Ramchandra Baba Sathe v. Janardan Apaji*⁽²⁾, referred to.

APPEAL against the decision of M. N. Choksi, Additional First Class Subordinate Judge of Dhulia, in suit No. 943 of 1910.

Suit by an agriculturist for account.

The plaintiff, a Mahomedan agriculturist who possessed considerable immoveable property consisting of fields, had several monetary dealings with the defendant, his creditor. The said dealings were squared

⁽¹⁾ (1882) 7 Bom. 185.

⁽²⁾ (1889) 14 Bom. 19.

off in the year 1892 and since then new dealings commenced. On the 13th August 1897 the defendant took two mortgage bonds from the plaintiff for Rs. 7,000, and further, on the 6th September 1900, he took two other mortgage bonds from the plaintiff for Rs. 12,500. The mortgages were with possession. Subsequently on the 24th December 1903 another mortgage bond was taken by the defendant from the plaintiff for Rs. 2,000. This mortgage was also with possession. The dealings between the plaintiff and the defendant continued up to the year 1909 and four promissory notes were passed by the plaintiff to the defendant to cover unsecured debts.

On the 25th November 1909 the defendant filed four suits against the plaintiff in the Court of the Subordinate Judge of Jalgaon to recover the amount due on the said four promissory notes. The plaintiff also on the 3rd November 1910 filed the present suit against the defendant in the Court of the First Class Subordinate Judge of Dhulia for a general account and redemption of the mortgaged properties under the provisions of the Dekkhan Agriculturists' Relief Act alleging that the income of the mortgaged properties had fully satisfied the debts due to the defendant. In consequence of the plaintiff's suit being filed in the Court at Dhulia, the four suits filed by the defendant in the Jalgaon Court were transferred to Dhulia. After the transfer of the suits the defendant contended that a joint account of the secured and unsecured debts should not be taken and that future interest should be awarded on the instalments.

The Subordinate Judge found that the plaintiff's prayers for taking an account of the secured and unsecured debts were properly joined, that the defendant's mortgages were fully satisfied from the profits received by him of the mortgaged properties up to April 1906 and that the debts due to the defendant

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under the promissory notes were wiped out by the profits received by him subsequent to April 1906.

A decree was, therefore, passed in plaintiff's favour ordering "that as the defendant is fully paid off, all the mortgaged estate is now free from the mortgage lien of the defendant and the defendant should pass a reconveyance of the said property at the plaintiff's expense, if the plaintiff so desires."

Defendant appealed.

G. S. Rao, for the appellant (defendant) :—The lower Court took accounts on a wrong principle. Under the rulings of this Court the account of the debts due on various promissory notes could not be taken along with the account of the various mortgage bonds: *Janoji v. Janoji*⁽¹⁾, *Ramchandra Baba Sathe v. Janardan Apaji*⁽²⁾, *Vishnu Keshav Joshi v. Satwaji valad Tulsaji Navale*⁽³⁾. The mode adopted by the lower Court for making accounts has prejudiced the appellant inasmuch as the surplus due after the satisfaction of the mortgage debt has gone on towards the discharge of the liability under the promissory notes. Moreover, the separate placing of sections 15D and 16 of the Dekkhan Agriculturists' Relief Act is important in this connection.

P. B. Shingne, for the respondent (plaintiff) :—There is a connection between the promissory notes and mortgages. Some of the promissory notes were in connection with transactions arising under the mortgages, *e. g.*, some of the promissory notes were connected with the payment of assessment of the mortgaged properties and costs of cultivation. The transactions being thus connected, one account of all the debts could be taken having regard to the wide language of section 13 of the Dekkhan Agriculturists' Relief Act. Section 15D and section 16 of the Act point to the same conclusion.

⁽¹⁾ (1882) 7 Bom. 185.

⁽²⁾ (1889) 14 Bom. 19.

⁽³⁾ (1897) P. J. 87.

The separate placing of the two sections is a matter of arrangement: *Hari v. Lakshman*⁽¹⁾, *Bhau Balaji v. Hari Nilkanthrao*⁽²⁾, and *Laluchand v. Girjappa*⁽³⁾. It cannot affect the principle of taking one account of all the debts.

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SCOTT, C. J.:—The defendant in this suit has had dealings with the plaintiff for many years, and has advanced money to him upon mortgage, and balances due on old accounts have been secured by the mortgage of property of the plaintiff. The mortgage-bonds outstanding at present are Exhibits 63, 64 and 65, which do not all relate to the same property, Exhibit 65 relating to property entirely different from that to which Exhibits 63 and 64 relate. The last of these mortgage-bonds was executed in December 1903. Further monetary dealings took place between the plaintiff and the defendant which are evidenced by promissory notes commencing with the 1st of August 1905. The defendant in 1909 and 1910 brought four suits in the Jalgaon Court upon promissory notes executed by the plaintiff subsequent to July 1905.

The plaintiff then instituted a suit for a general account under the Dekkhan Agriculturists' Relief Act, and for redemption of the mortgaged property, and upon his application the four suits filed in Jalgaon on promissory notes were transferred by the District Court, Khandesh, to the First Class Subordinate Judge in Dhulia. That Judge has now tried the plaintiff's suit for account and redemption, and in taking an account he has made up one general account of the mortgage transactions and the promissory note transactions. The mortgages, he finds, were satisfied by profits received by the defendant some time prior to April 1906, and he has taken the

(1) (1881) 5 Bom. 614.

(2) (1883) 7 Bom. 377.

(3) (1895) 20 Bom. 469.

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defendant as being in receipt of profits at the rate of Rs. 2,000 a year under his mortgages, which profits subsequent to the date of the satisfaction of the mortgage debts he has applied in the account in reduction of the defendant's claim upon the promissory notes.

That manner of taking an account has been challenged in this appeal. It is contended on behalf of the defendant that every mortgage of separate property, even where the suit relates to more than one mortgage, must be the subject of separate account under section 13 of the Dekkhan Agriculturists' Relief Act, and that under each separate mortgage the mortgagee is entitled to retain such surplus profits as he may have got before the date of the redemption suit or the date of the redemption decree, and as an authority for that contention the judgments of Sir Charles Sargent in *Janoji v. Janoji*⁽¹⁾ and *Ramchandra Baba Sathe v. Janardan Apaji*⁽²⁾ are referred to. Now if those authorities apply here they are binding upon us. But it appears to me that the case may be decided in favour of the appellant upon a somewhat different ground.

The mortgagor's right to file a suit for an account and redemption rests upon the provisions of the Dekkhan Agriculturists' Relief Act, and that Act makes provision for two different classes of suits for account by agriculturists. Under section 15D a suit for an account may be filed by a mortgagor-agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage, or he may combine a declaration of the amount due with a decree for redemption. That is a section which relates purely and exclusively to mortgage transactions. Then there is another section,

⁽¹⁾ (1882) 7 Bom. 185.⁽²⁾ (1889) 14 Bom. 19.

section 16, which enables him to sue for a general account of money dealings between him and the lender, and that section 16 enables him to sue for a bare declaration of the amount due without any relief being claimed. It says :—"Any agriculturist may sue for an account of money lent or advanced . . . by a creditor . . . and for a decree declaring the amount, if any, still payable." But naturally he does not require any further reliefs than that. The plaintiff does not wish to be authorized to pay if the payment is inconvenient to him, as soon as the amount due is ascertained. Therefore, the two sections where accounts are contemplated stand on a different footing. The plaintiff here, however, has combined his claim for account of the mortgage transactions with his claim for an account of the moneys lent upon promissory notes, and he has sought to import the relief to which he is entitled by way of redemption under section 15D into his claim for an account under section 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage. This we do not think he is permitted to do by the provisions of the Act, and if it were necessary to go further, it would be sufficient to point out that the result would be contrary to the decisions of Sir Charles Sargent which I have already referred to.

We, therefore, cannot accept the account taken by the lower Court, and the decree must be set aside and the suit remanded for a fresh account, treating the mortgage account as entirely separate from the promissory note account, so that the lender mortgagee will not be accountable for surplus profits received by him after the date when it has been found that the mortgage claims were satisfied.

The other point relating to the account which was argued on behalf of the appellant related to the amount of profits with which the mortgagee has been charged,

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namely, Rs. 2,000 per annum. We do not think that we should interfere with the decision of the lower Court upon that point which was come to after careful consideration of all the evidence, for we are not satisfied that the lower Court was wrong.

As the learned pleaders for the parties do not wish the mortgage account to be re-opened, or to be taken again, we remand the case simply in order that the promissory note account may be taken separate from the mortgage account. The plaintiff will be entitled to take back his mortgaged property on the footing of the mortgages having been discharged, and the suits on promissory notes will be dealt with by the lower Court in accordance with the result of the promissory note account upon the basis indicated in this judgment.

The defendant must pay half the costs in the lower Court and have his costs of this appeal. One set of costs to be set off against the other. The rest of the costs of the suit on remand to be dealt with by the lower Court.

Decree set aside and sui. remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

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UMABAI BHRATAR SHANKAR GODBOLE (ORIGINAL PLAINTIFF), APPELLANT, v. AMRITRAO ANANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.^a

Decree—Execution—Garnishee order—Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Civil Procedure Code (Act V of 1908), Order XXI, Rule 52—Darkhast kept alive as long as the decree remains unsatisfied—Practice and procedure.

Under a consent decree the sum found due was made payable in instalments; and the plaintiff was to be put in possession of the defendants' lands and also

^a First Appeal No. 209 of 1912.

to receive the defendants' share of the revenues of three Inam villages. In the execution proceedings under the decree in 1894, a consent order was taken whereby defendant No. 1 was constituted the plaintiff's tenant of the lands and the revenues of the villages were to be paid to the plaintiff through the Court. The Court then passed an order to the effect that the revenues of the villages should be paid by the village officers into Court. The payments so made were made over to the plaintiff till 1892, when the Court struck off the application for execution on the ground that the Court was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands in 1895 and issued one garnishee order of the same year. The plaintiff having appealed :—

Held, that the order passed upon the darkhast of 1894 continued alive and effective up to 1912, and would remain in force till the plaintiff's debt was satisfied.

PER CURIAM :—Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders issued under Order XXI, Rule 52 of the Civil Procedure Code (Act V of 1908) ; and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same Rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend.

FIRST appeal from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum.

Proceedings in execution.

On the 10th February 1887, a consent decree was passed in terms of an award, whereby the plaintiff was to be paid the sum of Rs. 41,690 in thirteen annual instalments of Rs. 3,100 each and the last instalment of Rs. 1,390 was to be paid in the fourteenth year. The plaintiff was to be put in possession of defendants' lands and to receive the revenue of the three Inam villages belonging to the defendants. The possession of the plaintiff was to continue till the satisfaction of the whole debt by the usufruct of the property.

In 1894, the plaintiff applied to execute the decree. During its pendency, the parties arrived at an agreement on the 16th September 1895 under which the defendant

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No. 1 was made a tenant of the plaintiff in respect of the lands. The terms of the agreement merged into an order passed by the Court. The plaintiff was put in actual possession of the lands and the Court directed the village officers to pay the revenues of the three Inam villages into Court. The revenues were accordingly paid and the plaintiff used to receive the same till 1912.

In 1912, the Court took up the application for execution, and struck it off on the following grounds :—

The Court has no power to carry out any of the conditions embodied in the agreement of 1895. They are matters entirely in the hands of the plaintiff and the defendants. Any dispute that may arise may be settled in a separate suit. Since 1894 the vasul of the three villages varying from Rs. 10 to Rs. 583 is sent from year to year to this Court by the village officers (Exhibit 169). It is paid to the plaintiff and darkhast is kept pending. This shows that the Court cannot execute the decree beyond the recovery of vasul through the village officers and there is no prospect of the decree being ever satisfied out of the vasul received from the three villages.

I see no reason to allow this darkhast to continue. It must be thrown out, and the parties must be left to enforce the usufructuary mortgage. The parties may do this by a separate suit or in any other way as they may be advised.

The plaintiff appealed to the High Court.

D. A. Khare, for the appellant :—The lower Court erred in striking off the *darkhast* of its own motion. The order made in 1895 was meant to have operation till the whole decree was satisfied. The Court cannot of its own motion re-open the darkhast and vacate the order once passed. See *Krishnaji v. Gurunath*⁽¹⁾ and *Manilal v. Maganlal*⁽²⁾.

S. R. Bakhale, for the respondents :—The lower Court appears to have acted under section 151 of the Civil Procedure Code. The decree was already on the files of the Court for execution for upwards of 12 years ; and a great many years must still elapse before the decree could be fully satisfied. The lower Court was perfectly

⁽¹⁾ S. A. No. 90 of 1906 (Un. Rep.). ⁽²⁾ S. A. No. 96 of 1905 (Un. Rep.)

justified in holding that the decree merely created a mortgage and the duty of the Court came to end as soon as the plaintiff was put into possession.

The future share of revenues of the defendants was an unascertained amount ; and not being in existence at the date of the order could not be attached. See *Tulaji v. Balabhai*⁽¹⁾. Under Order XXI, Rule 52, the property to be attached seems to be movable property and not immovable property. The Court can only attach the revenues that have accrued due and are in the hands of the village officers. It cannot attach the dues for future years. The general prohibitory order was therefore wrong in its very inception and the Court had authority to vacate it under section 151 of the Civil Procedure Code.

Khare, in reply :—The case of *Tulaji v. Balabhai*⁽¹⁾ does not apply. It was a case of political pension, which could not be said to be in existence until it was actually paid in. In the present case, the revenues of immovable property are attached, which stand on an altogether different footing.

BEAMAN, J. :—The plaintiff and the defendant submitted their original differences to arbitration in the year 1887. Upon the award a consent-decree was taken creating what appears to have been a usufructuary mortgage in the plaintiff's favour. The scheme of that award was clearly to pay off the sum of Rs. 41,000, said to be due by the defendant to the plaintiff, in fourteen years, by instalments of Rs. 3,100 a year, and in the fourteenth year an instalment covering the balance. The plaintiff was to be put in possession of the defendants' lands and also to receive the defendants' share of the revenues of three Inam villages. It is in respect of this latter part of the decree that the point arose with which alone we are now concerned.

⁽¹⁾ (1896) 22 Bom. 39.

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In 1894 the plaintiff put in a darkhast for the execution of this decree, and it appears that in the proceedings taken upon that darkhast the plaintiff and defendant entered into a further agreement, the main purpose of which was to constitute the defendant the plaintiff's tenant of the lands. There were many other minor details and provisions in case of default on the defendants' part, and loss occasioned thereby to the plaintiff. But those are immaterial. This agreement appears to reaffirm and be intended to carry out the scheme of the consent-decree of 1887. Again, the share of the revenues of the villages belonging to the defendant is to be paid through the Court to the plaintiff, and this agreement would appear to have been recorded as a modification or amplification of the original consent-decree, for the enforcement of which the Court would undertake responsibility. We may well doubt whether the Court was well-advised in accepting any modification of this kind upon those or any other terms. What appears to us to have been a more proper course would have been to record this, if at all, as a new agreement, and to record it, not as a decree of the Court, but as such agreement, in substitution of the first consent-decree. Even as to that, I mean the first consent-decree, we may again doubt whether the Court was well-advised in taking upon itself virtually the execution of a mortgage contract between these parties in the form of a consent-decree, without any of the preliminaries of a mortgage suit having been gone through. But notwithstanding the doubts we feel upon both these points the fact remains that the Court appears to have accepted this darkhast of 1894 at the close of the year 1895, and thereon to have issued a prohibitory order providing that the share of the revenues of the three Inam villages belonging to the defendant should be paid by the village officials to the Court's order to hold in satisfaction of

the decree, and was to be paid by the Court to the plaintiff. Such an order at that time, assuming that the defendants' share of the revenues of these Inam villages was an estate, would certainly have been within the express terms of Civil Circular 87 of the Order book of the year 1889; nor do we think that it would in any way conflict with the principle of the decision in *Tulaji v. Balabhai*⁽¹⁾ for regarding the estate as that which produces the revenue, and as something attachable in itself, it would fulfil the requirements which we understand to underlie the principle of Farran Chief Justice's judgment, namely that what is attached must be something in existence, and not merely in the future. It is perfectly clear that property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under Order XXI, Rule 52, and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend. The only doubt we feel in thus applying the rule to the principle of *Tulaji v. Balabhai*⁽²⁾, is whether Order XXI, Rule 52 was really intended to contemplate the attachment of immovable property. We think it unnecessary to dwell further upon this point, because it is clear in the events that have happened that the order of 1895 making the defendants' share of the Inam revenues of these three villages payable into Court for the benefit of the plaintiff was never appealed against and continued in force up to the date of the present proceedings.

In the year 1904 it would appear that the darkhast of 1894 upon which the order of 1895 was passed came

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under criticism, probably on account of its apparent staleness. The learned Subordinate Judge at that time, Mr. Wagh, held that the order of 1895 was still in force, the darkhast of 1894 was alive and must be continued. On that footing it would appear that the defendants' share of the revenues of these Inam villages has been paid into Court, and that the Court has paid it to the plaintiff under this darkhast of 1894.

In 1912 the learned Subordinate Judge appears to have called upon the parties, and to have taken up the matter of this darkhast again. The pleaders who represent the parties here cannot inform us whether the defendant really took any part in these proceedings. The plaintiff certainly did, and the learned Judge appears to have come to the conclusion that the Court was already *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands under the agreement of 1895, and issued one garnishee order of the same year. The learned Judge, therefore, came to the conclusion that the darkhast of 1894 was no longer in existence, and must be struck out. We think that in taking that view the learned Judge was wrong. From what has been already stated it is clear that however doubtful the steps may have been through which the order of 1895 was reached, that was an order upon the darkhast of 1894, and continued alive and effective up to 1912. We think that unless it could be shown that the plaintiff's debt was satisfied, for this appears to be the only condition imposed upon the continuity of the order in 1895, that order would still have to be in force. We certainly feel great sympathy with the learned Judge who evidently conceived himself to have been acting within the scope and principle of section 151, but we think that his proper course here would have been to issue notice to the parties concerned, if he thought it essential in the interests of justice to do so,

to show cause why the order of 1895 should not now be discharged on the ground of full and complete satisfaction of the plaintiff's debts. As matters stand no such satisfaction appears to have been pleaded before the learned Judge, and ordinarily it would be for the defendant, whose money was thus being appropriated, to take the first step and raise the first objection, if he really believed that his debt to the plaintiff was satisfied.

With these observations we think that the order complained of must be reversed, and that the darkhast of 1894 must still be considered to be alive and operative until it shall be brought to an end in the manner we have suggested, should the investigation thus set on foot prove that there is no need to continue further this garnishee order. In the circumstances we think that each party should bear his own costs of this appeal.

Order reversed.

R. R.

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, on reference from
Mr. Justice Beaman and Mr. Justice Hayward.*

BASANGAVDA BIN NAGANGAVDA (ORIGINAL DEFENDANT 1), APPELLANT,
v. BASANGAVDA BIN DODANGAVDA AND OTHERS (ORIGINAL PLAINTIFF
AND DEFENDANTS 2 TO 4 AND 6), RESPONDENTS.*

*Hindu Law—Mitakshara, Ch. II, sec. 5, pl. 4 and 5—Mayukha, Ch. VIII,
pl. 18—Compact series of heirs—Brother's widow—Sapinda—Uncle's sons—
Brother's widow nearer heir.*

The widow of a brother of the deceased is, as a *sapinda*, a nearer heir of the deceased than his paternal uncle's sons.

SECOND appeal against the decision of D. S. Sapre,
First Class Subordinate Judge of Bijapur with appellate

* Second Appeal No. 525 of 1913.

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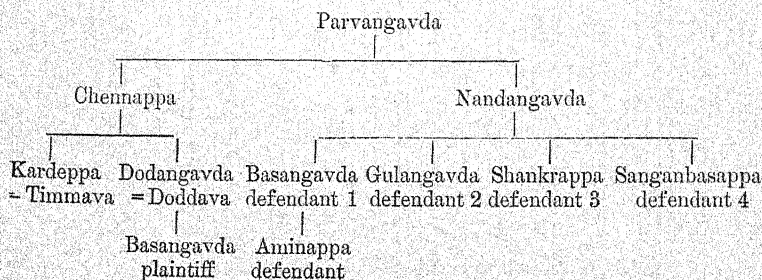
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powers, varying the decree of D. V. Yennemadi, Subordinate Judge of Bagalkot.

The plaintiff sued to recover from the defendants possession of the property in suit with future mesne profits. The plaint alleged as follows:—The property in suit along with some other property originally belonged to plaintiff's adoptive father Dodangavda and his elder brother Kardeppa; Kardeppa predeceased Dodangavda, leaving a widow Timmava; after the death of Kardeppa, Dodangavda became the owner of the whole property by right of survivorship, and after his death his widow Doddava became the owner thereof; subsequently to avoid a friction in the family, the two widows Doddava and Timmava divided the property among themselves; after the division, defendant 1, who and his brothers defendants 2-4 were plaintiff's cousins, being the sons of his paternal uncle Nandangavda, by fraudulent misrepresentation got a *malakipatra* (deed of ownership) executed by Doddava in respect of the plaint-property in the year 1883; the plaintiff was adopted by Doddava on the 7th October 1909; the alienation made by the plaintiff's adoptive mother was not binding on him; defendant 5 was the son of defendant 1 and defendant 6 was added as he was said to be a purchaser of a portion of the property from defendants 1-5; and the cause of action arose on the 7th October 1909.

The following is the genealogical tree :—



Defendant 1 denied the plaintiff's adoption by Doddava and contended that Doddava had surrendered her estate to him, he being the nearest reversionary heir, that the plaintiff could not question the alienation made by his adoptive mother before the adoption and that the allegations of fraud and misrepresentation made in the plaint were false.

The other defendants were absent though duly served.

The Subordinate Judge found that the plaintiff was the legally adopted son of Dodangavda, that the *malakipatra* relied on by the defendant was not void on account of the alleged fraud and misrepresentation, that defendants 1-4 were the nearest reversionary heirs of *watan* lands, survey Nos. 29 and 30 in suit, and Timmava, widow of Kardeppa, was the next reversioner in respect of the *jirayat* property described in the plaint, that in respect of the *malakipatra* the consent of defendants 1-4 was obtained but not that of Timmava, that the *malakipatra* was binding upon the plaintiff so far as the *watan* property was concerned, and that the plaintiff was entitled to recover possession of all property described in the plaint except the *watan* property. The Subordinate Judge, therefore, passed a decree awarding the plaintiff possession of the *non-watan* property in the suit and allowing the defendants to retain the *watan* property.

On appeal by the plaintiff, the appellate Judge found that the *malakipatra* of 1883 did not evidence an absolute surrender of the whole of Doddava's estate as Hindu widow in favour of the next reversioner or reversioners, that the plaintiff was not bound by the *malakipatra* and that the plaintiff's adoption by Doddava as son to her husband was proved. The appellate Court, therefore, varied the decree in the following terms :—

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I direct that the defendants (respondents) do deliver all the property—*watan* and *non-watan*—in dispute to the plaintiff-appellant. An inquiry is directed regarding the mesne profits for the property due to the plaintiff-appellant from the defendant-respondents from the date of the suit to that of delivery of possession, subject to the provisions of clauses (i), (ii) and (iii) of part (c) of rule 12 (1) of Order XX. The respondents to bear their costs in both the Courts and to pay those of the appellant in both the Courts.

As to the surrender of her rights by Doddava under the *malakipatra* the appellate Judge remarked :—

But it is of the essence of absolute surrender or acceleration as it is called that it should comprise the whole of the widow's estate and that it should be in favour of the next reversioner (see I. L. R. Cal. XIX 236, I. L. R. All. XXX 1, and I. L. R. Bom. XXXIV 165). Let us see if these conditions are fulfilled here. It is admitted before me that Doddava was in enjoyment of rights to officiate as patel as part of the inheritance that had come to her from her deceased husband. It is also admitted that these rights were not surrendered by the deed under consideration. These rights must beyond doubt constitute some sort of property. Mr. Desai for the contending respondent says that these rights were not surrendered by the deed because their alienation is forbidden by sections 5 and 7 of the Bombay Watan Act (No. III of 1874). But what section 5 of the Act prohibits is an alienation. I do not think that acceleration as such should be considered as an alienation. It only accelerates, that is, quickens the motion of what is to take place in future and is, therefore, not, I should believe, an alienation in the proper sense of the word. Assuming that acceleration is an alienation, section 5 of the Watan Act does not absolutely forbid an alienation of rights to officiate as patil, but what it does is that it renders the sanction of Government necessary for the purpose. It is not shown that Doddava made any attempts to obtain the sanction and that her attempts were unfruitful. It may, therefore, be taken as established that these rights were intentionally reserved. If this is so, it is evident that Doddava did not surrender to defendant 1, that is, to defendants 1-4, all of her widow's estate in her deceased husband's property. The surrender under consideration does not thus amount to an absolute surrender of the whole of Doddava's estate as a Hindu widow, and is, therefore, not an acceleration in the technical sense of the word.

When law says that acceleration must be in favour of the presumptive reversioner, this, I think, means that if there are more than one such presumptive reversioners, it must be in favour of them all. I have already pointed out that at the date of the deed under consideration Timmava was the presumptive reversioner of the deceased Dodangavda in respect of his *non-watan* property, but admittedly she was not one of those to whom Doddava is

said to have surrendered her widow's estate. If a valid surrender were intended, Timmava ought certainly to have been one of those to whom it was made. As I have pointed out already, she was not even a consenting party to it. The surrender or acceleration would seem to be invalid on this ground also.

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Defendant 1 preferred a second appeal which was heard by the Division Bench composed of Beaman and Hayward, JJ., who, on the 26th June 1914, delivered the following interlocutory judgments :—

BEAMAN, J. :—The point of greatest importance and difficulty in this appeal is whether Timmava, widow of Kardeppa, or the first cousins of the deceased Dodangavda stand nearest in the reversion.

Dodangavda and Kardeppa were undivided brothers. Kardeppa died leaving him surviving his widow Timmava. Then Dodangavda died and his widow Doddava took her life estate. She professed to give away the whole of it in 1883 to her deceased husband's first cousins, the defendants. Twenty-six years later she adopted the plaintiff. Timmava, the widow of Kardeppa, is still alive.

The defendants rely on the doctrine of acceleration which may now be taken to be established law. I shall have to say a few words upon that later. Here it is sufficient to state that true acceleration can only occur between the tenant of the life estate and the nearest reversioner. Therefore, if Timmava was the nearest reversioner in 1883, there could have been no acceleration in that year in favour of the defendants, and the plaintiff would, in the absence of any other defence, be entitled to succeed.

It may be noted here, though this fact falls more properly to be considered in discussing the doctrine of acceleration, that the life estate comprised certain *watan* property as well as other *non-watan* immovable property. It is not disputed that under the law of

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watans the defendants were the nearest reversioners to the *watan* lands. So that in respect to so much of the claim, if the acceleration be otherwise good, there can be no doubt but that the plaintiff must fail. The larger portion of the life estate, however, is not *watan* land; and the decisions of both Courts below are based on the assumption that Timmava, and not the defendants, was the nearest reversioner. In my opinion, although two learned Judges below appear to have taken it for granted that she was, and early in the argument here pleaders on both sides were disposed to support that view, she is not.

It is contended for the plaintiff that the decision in *Lallubhai Bapubhai v. Mankuwarbai*⁽¹⁾ concludes the point. That case was confirmed by the Judicial Committee, and undoubtedly settled the law it professed to lay down. The question is, whether that or any other authority goes the length of holding that the widow of a brother is nearer in the reversion than first cousins? It can only be by an extension of any actual decision, in other words by taking the supposed principle of such a case as that of *Mankuwarbai*⁽¹⁾, and extending it to the case before us, that this can be affirmed. It is, therefore, necessary to be sure that we are rightly apprehending the principle underlying the decision in *Mankuwarbai's case*⁽¹⁾, before saying that it not only can, but must, be extended to cover this case.

What was decided in *Mankuwarbai's case*⁽¹⁾? This and this only. Where there is a competition between reversioners after the extinction of all designated heirs, the widow of a *gotraja sapinda* excludes male *gotraja sapindas* in a remoter line. I can accept that at once as undoubtedly the law of this Presidency, whether really good Hindu law or not, and yet hold, for reasons

⁽¹⁾ (1876) 2 Bom. 388.

which will be fully stated, that the case before us is not necessarily governed by that decision or by the principle upon which it is based. In a much later case decided by Telang, J., probably the greatest Hindu Judge who has sat on this bench, it was held that, where there is a competition between reversioners after the exhaustion of all designated heirs, the widow of a *gotraja sapinda* is postponed to any male in the same line. And that decision was followed and explained in a very recent case (*Kashibai v. Moreshwar*⁽¹⁾) decided by the present learned Chief Justice. Almost synchronously a bench of this Court consisting of my brother Hayward and myself decided a similar case (*Khandacharya v. Govindacharya*⁽²⁾) on exactly the same principle and professedly following *Rachava v. Kalingapa*⁽³⁾ and *Kashibai v. Moreshwar*⁽¹⁾.

I rely upon those three cases. I say that so far as the law permitted after the decision in *Mankuvarbai's case*⁽⁴⁾, they correctly lay down the Hindu law applicable to such facts as those before us, and that the principle of those cases is the principle which ought always to be applied.

That principle does not in any way conflict with the actual decision in *Mankuvarbai's case*⁽⁴⁾, though it is open to argument whether there are not *dicta* in the judgment of West, J., and afterwards in the judgment of the Judicial Committee, which imply the extension of the reason of that case as far as the plaintiff would have it extended in the case before us.

The point really lies in a very narrow compass. I do not propose to attempt any elaborate examination of the Hindu law books, or any nice criticism of the textual commentaries with which the subject has been encumbered. But a careful critical study of West, J.'s

(1) (1911) 35 Bom. 389.

(3) (1892) 16 Bom. 716.

(2) (1911) 13 Bom. L. R. 1005.

(4) (1876) 2 Bom. 388.

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judgment in *Mankuwarbai's case*⁽¹⁾, and of the judgment of the Judicial Committee confirming it, shows that in spite of the extraordinarily learned and exhaustive examination of the whole available Hindu law, the conclusion rested finally on what was held to be an established custom, rather than any authoritative deduction from the words of the Hindu law givers and commentators.

The latter were found to be so nebulous, contradictory, inconsistent and unconvincing as to afford but little solid ground upon which to base a decision either way. I understand that the custom was made out from the answers of local Shastris to questions propounded to them by the authors of West and Buhler. It is possible that such answers may have truly represented established local customs ; but in strictness they can hardly amount to what the law ordinarily requires as proof of custom. They are in reality no more than the dogmatic interpretation by a body of unknown persons of certain ancient writings with which they were supposed to be familiar. In dealing with this point their Lordships of the Judicial Committee say, *obiter*, that the Shastris have gone so far as to declare that a sister-in-law excludes first cousins. As that is precisely the case before us, the plaintiff naturally relies most strongly on this passage. It is, however, as I have just said, purely *obiter*. And it is noteworthy that in fact the Shastris consulted were not unanimous on this point. One decided that the sister-in-law did, another that she did not, exclude a first cousin. And apart from that there is, as far as I know, no authority whatever, either in the accredited law books or in decided cases for the proposition on which the plaintiff's success in this case must depend. So far from it being a proved custom in this Presidency that

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a sister-in-law excludes a first cousin, I am moderately confident that no such rule of succession has ever been alleged, much less proved, in our Courts. The textual basis of the rule laid down in *Mankuvarbai's case*⁽¹⁾ appears to have been chiefly a passage in Brihaspati. The reason contained in the passage is so childish and fanciful, and would lead, if pushed to its logical conclusion, to such absurdities, that it is no wonder Telang, J. declined to adopt it, saying that it looked, as indeed it does, like proving too much. The rule in *Mankuvarbai's case*⁽¹⁾, which must, I think, be regarded as something of a judge-made innovation, could hardly be made good by any mere collation of the recognised sources of Hindu law. But in applying that law, it was held that a custom had grown up in the Bombay Presidency, which warranted laying down the broad rule, that, as between competing reversioners, the widow of a *gotraja sapinda* took in preference to a male *gotraja sapinda* in a remoter line. Had the point needed decision at the time, it is possible that West, J. would have extended the rule so as to give preference to the widow of a nearer male *gotraja sapinda* over a remoter male *sapinda* in the same line. But Telang, J. refused to do this, holding that, where the competitors were in the same line, sex and not mere proximity was the determining consideration, and that any male in the same line excluded the widow of any other male, although the latter, had he been living, would have been nearer to the *propositus*, and so the next reversioner. It is only by taking the reasoning or parts of the reasoning in West, J.'s judgment, by saying that it in effect establishes this proposition, that the widow of a deceased *gotraja sapinda* fills her husband's place in all heirship competitions, that the plaintiff can hope to succeed in his contention that Timmava was a nearer

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reversioner than the defendants. But that is not the law. Since *Rachava's case*⁽¹⁾ it cannot be argued that greater propinquity in the same line makes a widow nearer in reversion than a male in the same line. So that the only real question arising on the cases is what is meant by "the line"? In my opinion all the cases are here in agreement. There is not one in which, where the question was, which of two persons claiming to be reversioners is entitled to the estate, the line was started within the group of designated heirs, or as it is often called the "compact series".

No support is to be found anywhere for such a method, except the conflicting replies of the local Shastris, unsupported by reason or text.

It appears to me to be too clear to admit of doubt that where we have to look for the next reversioner, we must start the line outside the group of designated heirs. Within that group there could, of course, never be any conflict between the widow of a designated heir, and a designated heir. It is only after the exhaustion of the designated heirs that the search for the nearest reversioner begins. The plaintiff's contention appears to be, that although the statement just made is self-evident, yet where the compact series is exhausted, the first line must be started from the father, not from the grandfather of the *propositus*. If that were done here, the line would begin with the father of Kardeppa and Dodangavda, himself one of the designated heirs within the compact series, and of course the widow of either of his sons would be in the line, while his nephews would not. It will be seen that, whether by mere accident or because the learned Judges responsible for those judgments rejected any such method, this has never once been done. The language of Telang, J. is particularly

(1) (1892) 16 Bom. 716.

clear on the point. The line is to start in the first instance from the paternal grandfather. When that line is exhausted, without yielding a reversioner, a fresh line is to be started from the paternal great-grandfather and so on. In the case which Hayward, J. and I decided, we followed this rule, and, speaking for myself, I am sure I did so because it did not occur to me as arguable that a line laid out for the purpose of finding a reversioner could properly be started within the compact series. This too was what was done, and I cannot believe by pure accident, in all the other cases. But it might be said of them that there was no surviving widow of any male within the compact series, while in *Khandacharya's case*⁽¹⁾ there was. Still in that case the Court started the line, not from the father of Venkatesh the deceased *propositus*, but from his paternal grandfather Venkatesh 1. Even so the widow of his brother came nearer in the reversion than second cousins. But had there been first cousins in the competition it is plain upon the principle stated in the judgment that the result would have been different and that the widow would then have been postponed. If in the present case the line be started from the paternal grandfather it is clear that Timmava is not only in the same line as the defendants but in precisely the same degree of propinquity. The latter fact is unimportant now. If she represents a deceased male *gotraja sapinda* in the same line, then she comes last of that line, and any male, found in it, excludes her. The defendants are in the line, and, in my opinion, they clearly exclude her. Nothing in the decided cases compels me to extend the rule, as I am asked to extend it here, so as to exclude the first cousins in favour of the sister-in-law. I think that doing so would be entirely opposed to the sense of the Hindus of this Presidency and the spirit of the old

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Hindu law. Women are probably much more favoured already in this Presidency under the liberal decisions of this High Court than elsewhere in India ; but I find it difficult to believe that there is really anything in the recognized Hindu scriptures or the authoritative commentaries on them to warrant the proposition for which the plaintiff is now contending. If the rule really rested on the extravagant texts of Brihaspati, then there would be no need to search along any line for the next reversioner, for neither of the brothers Kardeppa or Dodangavda are dead, each is only half dead, and no reversion has opened.

But if there is a question of reversion to be investigated, it pre-supposes the complete exhaustion of the compact series, and places the starting point of the search outside that series invariably, as Telang, J. states, first at the paternal grandfather. Let that be done here and it will be seen at once that Timmava was not the next reversioner in 1883 while the defendants were.

The doctrine of acceleration, very clearly stated in the judgment of Lord Morris in *Behari Lal v. Madho Lal Ahir Gayawal*⁽¹⁾, would seem to have been almost invariably entangled in subsequent decisions of the Indian Courts, with the altogether different doctrine of alienation. Briefly, Hindu widows in enjoyment of life estates may not alienate any part of the immovable property, except for legal necessity. Analysis will show that this is the single recognized justification, although the language of Judges often obscures it, and suggests that pious motives may be substituted for necessity, and may validate even larger alienations, and freer powers to alienate than could be seriously considered on a narrow ground of mere secular necessity. Yet, whether the necessity be temporal or spiritual, so sought for as

(1) (1891) 19 Cal. 236 at p. 241.

legal justification for these alienations, it will always be seen on close examination to be necessity and nothing else. Long ago the legal notion got abroad and soon received judicial sanction, that the consent of all the nearest (in order) reversioners was good proof of the necessity for the alienation. If there had been no necessity, it was argued, the reversioners would never have consented to lose their expectant rights. Here it is to be observed that in applying this doctrine it is not the consent of the reversioners, *per se*, which makes good what would otherwise be a bad alienation by a life tenant, but the presumed, though undiscovered, necessity, of which that consent is good proof. If there are on the date of the alienation three reversioners in this order, A, B, C, and the alienation be made to B, A consenting, then it may be presumed that in A's judgment there was a true necessity for the alienation. In a less degree too, of course, if C consents; for, although C is last in the reversion, it is quite possible that, but for the alienation to B, he might have been the nearest reversioner at the termination of the life estate. But no inference of this kind could reasonably be drawn from the consent of B to an alienation to himself. Most men will consent to receiving a benefit, and in those cases giving this "consent" (which in this connexion hardly has any meaning) would not in fact or at the bar of reason and common sense point towards the existence of any necessity. A great majority of cases falling under this doctrine are, however, cases of alienations to outsiders. If the consent of all reversioners be obtained to such an alienation, it is probably true in fact, as assumed by law, that that consent indicates the existence of some necessity for the alienation. I have laboured this extremely elementary proposition more than its intrinsic content would seem to need, because I have found in so many decided cases recurring confusion between the principles governing this kind of alienation

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and a proper case of acceleration. The only essentials of a good legal acceleration are that it should be to the next in reversion, and that it should cover the whole life estate. But the consent of the reversioner in whose favour the reversion is accelerated, or of any other more distant reversioner, is obviously immaterial. Nor does any question of necessity arise. The reason why the two conditions I have stated are essential is, and I think always ought to be, obvious. By accelerating (as the word implies) the tenant of the life estate may be said figuratively to commit legal suicide. She brings about exactly the same legal results as would follow by operation of law upon her natural death. If at the date of the acceleration the widow with the life estate were to die, the next reversioner in whose favour the acceleration is made would, of course, take the whole life estate accelerated.

But no acceleration can be made in favour of any one but the next reversioner, for that would be more than committing legal suicide : it would be making a will as well. And this the widow has no power to do, as far as the immovable property in which she has the life estate is concerned.

It is, therefore, absurd to talk of accelerating in favour of, say, the reversioner third in order of proximity, with the consent of the two who stand nearer. That is not acceleration but alienation. Similarly it would be absurd to talk of accelerating four-fifths of the life estate. For, since the validity (in theory) of the acceleration depends upon the result corresponding exactly with the result which would follow the natural death of the widow accelerating, there can never be any question of deliberate reservation in her own favour. It does not, however, follow from this, as indicated in an earlier passage of this judgment, that the life estate may not be composite and that there may not be different

reversioners to its parts. Thus, where the life estate in immovables comprises *watan* and other property, it is quite possible that the nearest reversioner to the *watan* may not be the nearest reversioner to the rest of the immovable property. This, I believe, to be the only real exception to the general rule that a true acceleration must pass the whole life estate. And in strictness it is not an exception. For, so far as the *watan* property accelerated is concerned, the acceleration does bring about exactly the same legal result as the death of the life tenant would have done.

Theoretically, acceleration is not an alienation at all but a mere renunciation, the obliterating of a bar. The life estate is withdrawn in its entirety, it is voluntarily extinguished, and it is not the tenant of the life estate, but the law which does the rest. It will, therefore, become apparent that no consent of the reversioners or any one else can be needed to validate a true acceleration. Still less any proof of necessity. The condition that the acceleration must comprise the whole life estate is essential to its theoretical perfection. So that a widow with a life estate in twenty fields cannot accelerate ten of them and retain ten, and this applies universally and irrespective of the proportion of what is alienated to what is reserved. But I should doubt whether niggling objections on this score, such as have been raised here and been acceded to by the Courts below, can fairly be said to arise under a commonsense and rational application of the general principles. For example, it is contended for the plaintiff that because the widow with the life estate did not specifically accelerate the right she had to nominate an officiating *watandar*, when she accelerated the *watan* lands, that was a reservation which invalidates the acceleration. I think that is going too far. In the first place, I believe, it was merely an unintentional omission, the right being of no value that I can see to the widow. I have

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not the least doubt that, had she thought of it and been competent to accelerate it, she would have done so. But the real answer perhaps is, that without the sanction of Government she was not competent to alienate this right. And it may, of course, have been that neither she nor the next reversioner in whose favour she accelerated cared to raise the question before the revenue authorities as long as the widow lived. In point of fact we were told during the argument that she never attempted to exercise this right for many years after the acceleration of 1883. She has asserted it recently, but probably under legal advice for the sole purpose of taking this objection. Now, small and unintentional omissions of that sort might occur in the acceleration of every large life estate in immovable property. I think in this country, where such transactions are often effected without professional assistance, all such *casus omissi* ought to be neglected.

What is to be looked at is the intention of the tenant of the life estate, and that is not to be defeated, if on the whole plain, merely because she has failed to enumerate every tree or shed or right of way, or other unimportant right annexed to or inherent in the property.

I am of opinion that the failure to mention this *watan* right specifically in the acceleration of 1883 does not invalidate it, as being a conscious and intentional reservation to the accelerating tenant of the life estate, of any part of it in her own favour.

In my opinion, therefore, the plaintiff fails on every point and his suit ought to be dismissed with all costs throughout. In the event, however, of my being wrong in holding that Timmava was not the next reversioner, I should entirely concur with the order proposed by my brother Hayward. The only point of law, therefore, upon which we differ is whether in 1883 Timmava or the defendants stood next in the reversion. That point

must be referred under section 98 of the Civil Procedure Code.

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HAYWARD, J.:—Plaintiff sued as the adopted son to recover certain property, *non-watan* and *watan*, transferred twenty-six years before his adoption by his adoptive mother to the first cousins of his adoptive father.

The original Court held that the transfer was ineffectual as an acceleration or surrender by the adoptive mother of the *non-watan* property as there was in existence a widow of a brother who was the next reversioner in preference to the first cousins of the adoptive father. But that the transfer was effectual as an acceleration or surrender by the adoptive mother of the *watan* property as the widow of the brother was excluded from inheritance to *watan* property and the first cousins were the next reversioners under the Watan Act.

The first appeal Court held that the transfer was not even effectual as an acceleration or surrender by the adoptive mother of the *watan* property as it did not include the right to appoint an officiating patil and was consequently not a surrender of the whole of the *watan* property under the Watan Act.

The second appeal to this Court has resulted in the suggestion towards the close of arguments that the widow of a brother would not be the next reversioner in preference to the first cousins as assumed up to that stage of the proceedings by all parties. The suggestion has been that a special rule would govern the order of succession of widows of brothers excluding them from their place at the end of the first collateral lines of the brothers descending through the father and postponing them to the end of the second collateral lines of the first cousins descending through the grandfather and that

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the general rule placing widows of collateral *gotraja sapindas* at the end of the collateral lines of their husbands and preferring them to males of remoter collateral lines would only come into operation in respect of the second collateral lines of the first cousins descending through the grandfather and apply to those lines and the subsequent lines descending through the great-grandfather, the great-great-grandfather and other remoter grandfathers.

The suggestion has not, in my opinion and with deference to my learned brother, been shown to be based on any solid foundation. The Mitakshara has laid down the rules of succession as follows in Ch. II, sec. IV, pl. 1 and 7: "On failure of the father brothers share , on failure of brothers also, their sons share", and in Ch. II, sec. V, pl. 4: "On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons", and in Ch. II, sec. V, pl. 5: "On failure of the paternal grandfather's descendants, the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family" (Setlur's Collection of Hindu Law Books on Inheritance). The Mitakshara thus dealt with the first collateral lines of *gotraja sapinda* descending from the father, the second collateral lines descending from the grandfather and the remoter collateral lines descending from the remoter grandfathers. The Mitakshara made no specific mention, however, of the widows of collateral *gotraja sapindas*, but it was decided in the case of *Lakshmibai v. Jayram Hari*⁽¹⁾ by Melvill, J., that the general rule was "the

⁽¹⁾ (1869) 6 Bom. H. C. R., A. C. J. 152 at p. 156.

wives of all *sapindas* must be held to have rights of inheritance co-extensive with those of their husbands" in view of the mention of the grandmother and the great-grandmothers, following the opinion expressed by West and Buhler in their work on Hindu Law. This decision was developed in the subsequent case of *Lallubhai Babubhai v. Mankuvarbai*⁽¹⁾. West, J., criticized a case in which a sister-in-law had been postponed to a first cousin and quoted another in which a sister-in-law had been preferred to a first cousin (p. 442), and after referring to other cases of widows of *gotraja sapindas* laid down the general rule that "the widow of the *gotraja sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line" (p. 449). The Privy Council referred to the case in which the sister-in-law had been preferred even to first cousins and confirmed the general rule, as a matter of custom in the Bombay Presidency, in the appeal entitled *Lallubhai Babubhai v. Cassibai*⁽²⁾. In the case of *Kesserbai v. Valab Raoji*⁽³⁾, Westropp, C. J., remarked that "The rule laid down (that the widows of *gotraja sapindas* stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll (as amongst others) that of the sisters"; whose place he had indicated as being next after the grandmother, that is to say, before the grandfather (pp. 197 and 209). In the case of *Nahalchand Harakchand v. Hemchand*⁽⁴⁾ West, J. further emphasized the right of persons whose place was specially fixed to precede widows of *gotraja sapindas* by saying "The members of the 'compact series' of heirs specifically enu-

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⁽¹⁾ (1876) 2 Bom. 388.⁽³⁾ (1879) 4 Bom. 188 at p. 209.⁽²⁾ (1880) 5 Bom. 110 at pp. 125, 126.⁽⁴⁾ (1884) 9 Bom. 31.

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merated take in the order in which they are enumerated... preferably to those lower in the list and to the widows of any relatives whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow is recognised to take her husband's place in competition with the representative of a remoter line" (p. 34). The compact series of heirs has been referred to as the series ending with the brother's son in both the Mitakshara and Mayukha (Mitak., Ch. II, sec. V, pl. 2; and Mayukha, Ch. IV, sec. VIII, pl. 18. Setlur's Collection of Hindu Law Books of Inheritance). The particular privileges reserved by these two cases did not, therefore, extend to members of the second collateral lines descended from the grandfather. In the case of *Rachava v. Kalingapa*⁽¹⁾ Telang, J. did not refer to all the rules of succession quoted above from the Mitakshara. It was not necessary to do so, as the case before him related only to succession among members of the second collateral line descending from the grandfather. He did not even quote *verbatim* the rules relating to succession among members of the second collateral lines descending from the grandfather or of the remoter collateral lines descending from remoter grandfathers. But he stated without qualification that "The decision in *Lallubhai v. Mankuvarbai* having been affirmed by the Privy Council, the eligibility for inheritance of female *gotraja sapindas*, who have become such by marriage, is no longer open to dispute. And it also must be taken to be the result of that decision, that where the contest lies between a female *gotraja* representing a nearer line, and a male *gotraja* representing a remoter line of *gotraja sapindas*, the former inherits by preference over the latter" (pp. 718-719). Similar remarks apply to the cases of *Kashibai v. Moreshwar*⁽²⁾ decided by a Bench including the

⁽¹⁾ (1892) 16 Bom. 716.⁽²⁾ (1911) 35 Bom. 389

present Chief Justice and *Khandacharya v. Govindacharya*⁽¹⁾ decided by the present Bench. It appears, therefore, to me that the general rule in favour of widows of *gotraja sapindas* of nearer collateral lines excluding male *gotrajas* of remoter lines has been laid down as a general rule having application to all collateral lines and not merely to the second and subsequent collateral lines descending from the grandfather and remoter grandfathers by a long series of decisions of this Court.

The result of that view, if correct, would be that the brother's widow was the next reversioner to the *non-watan* property in preference to the first cousins of the adoptive father. The brother's widow has been found not to have given her consent to the transfer of the *non-watan* property. That finding proceeded on the view that there was no evidence of such consent, overlooking the twenty-six years' acquiescence which might well have been regarded as good evidence of implied consent. If it had been a case of alienation to third parties it might have been necessary to consider whether that finding could not be challenged as consequently wrong in law and whether in any case the consent was necessary of the female next reversioner in addition to the consent of the subsequent male reversioners in view of the remarks in the cases of *Vinayak v. Govind*⁽²⁾ and *Bajrangi Singh v. Manokarnika Bakhsh Singh*⁽³⁾. But it was not a case of alienation to third parties. It was a gift to the subsequent reversioners and the doctrine of consent indicating legal propriety or necessity could not be extended to gifts to reversioners as pointed out in the case of *Pilu v. Babaji*⁽⁴⁾. The transfer, moreover, could

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⁽¹⁾ (1911) 13 Bom. L. R. 1005.⁽³⁾ (1907) 30 All. 1 at p. 21.⁽²⁾ (1900) 25 Bom. 129 at pp. 135, 136.⁽⁴⁾ (1909) 34 Bom. 165.

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not be held effectual as an acceleration or surrender, because it did not pass the estate to the next but to the subsequent reversioners. It could only have been held effectual as a joint acceleration or surrender of the estates both of the holder and the next reversioner to the subsequent reversioners. But something more than mere implied consent of the next reversioner would have been necessary to constitute that reversioner a party to the acceleration or surrender in favour of the subsequent reversioners.

The result of my view, even if correct, would not, however, affect the validity of the transfer of the *watan* property. The brother's widow would, in any case, be excluded from the inheritance by the special provisions of the Watan Act and the transfer would *prima facie* be valid as an acceleration or surrender in favour of the next reversioners and not merely of subsequent reversioners. It has, however, been contended that it was invalid as it related merely to the *watan* property and as it did not include the right to appoint an officiating patil under the Watan Act and as it was not, therefore, an acceleration or surrender of the whole estate vested in the watandar. But it does not appear to me to be contrary to the general principle that the whole estate must be surrendered as laid down by the Privy Council in the case of *Behari Lal v. Madho Lal Ahir Gayawal*⁽¹⁾ to regard the *watan* property with its special rules of succession as a separate estate vested in the watandar and to hold that the rule has no application to property like the right to appoint an officiating patil which, at most, would be property inalienable under the Watan Act without the special sanction of Government.

The first appeal Court's decision decreeing the claim would, therefore, in my view of the case, have to be

⁽¹⁾ (1891) 19 Cal. 236 at p. 241.

confirmed as regards the *non-watan* property, but reversed and the claim dismissed as regards the *watan* property and the parties ordered to bear their own costs throughout including the costs in this Court.

The case being thus referred it was argued before Scott, C. J.

P. D. Bhide, for the appellant (defendant 1):—Timmava was not the nearest reversioner, as on the death of Dodangavda, in the absence of heirs as far as brother's sons, the inheritance would go to the grandfather's line. The rule of the Mitakshara and the Mayukha is that on the exhaustion of the owner's line, we go to the father's line and on the exhaustion of the latter, we go to the grandfather's line and the grandfather heads this line. We cannot descend again to the father's line after once the grandfather's line is reached: Mayne's Hindu Law, paragraph 573. Both Timmava and the defendant come in the grandfather's line, and hence according to the ruling in *Rachava v. Kalingapa*⁽¹⁾, the male in the same line excludes the female belonging to that line. In *Kashibai v. Moreshwar*⁽²⁾ and *Khandacharya v. Govindacharya*⁽³⁾, the line is made to begin with the grandfather. Even in *Rachava v. Kalingapa*⁽⁴⁾, Telang, J. starts with grandfather's line, and that is what he has expressed in his judgment. The cases in *Kesserbai v. Valab Raoji*⁽⁵⁾, *Nahalchand Harakchand v. Hemchand*⁽⁶⁾ and *Russoobai v. Zoolekhabai*⁽⁷⁾ do not apply as the point and the heirship question there were altogether different and are mere *obiter dicta* so far as the present question is concerned. The decision in *Trikam Purshottam v. Natha Daji*⁽⁷⁾ does not apply as there

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(1) (1892) 16 Bom. 716.

(4) (1879) 4 Bom. 188.

(2) (1911) 35 Bom. 389.

(5) (1884) 9 Bom. 31.

(3) (1911) 13 Bom. L. R. 1005.

(6) (1895) 19 Bom. 707.

(7) (1911) 36 Bom. 120

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the competition was not as in the present case between brother's widow and paternal uncle's sons. Moreover, the Bombay rulings have already introduced female heirs and the scope of this introduction should not be widened but their rights should be restricted within strict limits and should not be allowed to preponderate over those of males.

The acceleration in the present case is of the whole property which Doddava possessed and the mere right to officiate or appoint a deputy not being surrendered cannot make it a partial acceleration. The case of *Behari Lal v. Madho Lal Ahir Gayawal*⁽¹⁾ is the leading case, and all that it says is that the widow should surrender all that she has in the property and should not reserve her widow's estate or any interest in the property surrendered. Thus *Pilu v. Babaji*⁽²⁾ does not apply. The brother's widow Timmava acquiesced for over twenty-five years and thus it should be considered that she had assented to the acceleration. Timmava was also a female reversioner and as such her consent would not be very material: *Vinayak v. Govind*⁽³⁾.

K. H. Kelkar, for the respondent (plaintiff):—Timmava being in the father's line was the nearest reversioner and as such should be preferred to the paternal cousins. The father's line should be first exhausted after the compact series. The grandfather is given a special place but after him the widows of the males in the compact series and the father's line would be preferred to males coming in the grandfather's line: *Nahalchand Harakchand v. Hemchand*⁽⁴⁾, *Rachava v. Kalingapa*⁽⁵⁾, *Lallubhai Bapubhai v. Mankuvarbai*⁽⁶⁾, *Kesserbai v. Valab Raoji*⁽⁷⁾, *Vithaldas Manickdas v.*

(1) (1891) 19 Cal. 236.

(4) (1884) 9 Bom. 31.

(2) (1909) 34 Bom. 165.

(5) (1892) 16 Bom. 716.

(3) (1900) 25 Bom. 129 at p. 135.

(6) (1876) 2 Bom. 388.

(7) (1879) 4 Bom. 188.

Jeshubai⁽¹⁾ and *Rakhmabai v. Tukaram*⁽²⁾. There the step-mother and the son's widow came before the grandfather, even apart from the case of the sister who comes after the grandmother. In the cases of *Khandacharya v. Govindacharya*⁽³⁾ and *Kashibai v. Moreshwar*⁽⁴⁾, it was not necessary to decide whether the line begins with that of the grandfather and whether the father's line was or was not to be preferred.

There was only a partial acceleration—the whole property was not given to the reversioner—and thus according to *Pihu v. Babaji*⁽⁵⁾ it was inoperative as an acceleration. Timmava's consent was not taken; therefore it cannot be said that there was any acceleration, as the nearest heir Timmava had not assented. The ruling in *Behari Lal v. Madho Lal Ahir Gayawali*⁽⁶⁾ lays down that the whole of the widow's estate should be surrendered.

SCOTT, C. J. :—In my opinion Timmava, the widow of Kardeppa, Dodangavda's brother, is a nearer heir of Dodangavda than his uncle's sons, the defendants.

I entirely agree with the reasoning and conclusion of Hayward J. upon the point. The compact series of heirs ends with the brother's son (Mitakshara, Ch. II, sec. V, pl. 2; Mayukha, sec. VIII, pl. 18).

The grandmother's place is specially fixed, and this alone gives her preference over unspecified *sapindas* in the line of the father. I can find no reason for treating the brother's widow as a *sapinda* to be postponed to all males capable of inheriting in the line of the grandfather. On the contrary the position that brothers' wives are *sapindas* in the line of the father for all purposes results

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(1) (1879) 4 Bom. 219.

(2) (1886) 11 Bom. 47.

(3) (1911) 13 Bom. L. R. 1005.

(4) (1911) 35 Bom. 389.

(5) 1909) 34 Bom. 165.

(6) (1891) 19 Cal. 236.

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clearly from the following passage in the Acharakanda of Vijnaneshvara which was discussed in *Lallubhai Bapubhai v. Mankuvarbai*⁽¹⁾, and very recently by the Judicial Committee in *Ramchandra v. Vinayak*⁽²⁾. "In like manner brothers' wives also are (*sapinda* relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them)." Mr. Justice Hayward has referred to *Kesserbai v. Valab Raoji*⁽³⁾ and *Nahalchand Harakchand v. Hemchand*⁽⁴⁾. I will only add in support of his conclusion reference to *Russoobai v. Zoolekhabai*⁽⁵⁾ and *Trikam Purshottam v. Natha Daji*⁽⁶⁾. In the first of these cases the judgment was delivered by Sir Charles Sargent, one of the Judges who decided *Ramchandra v. Krishnaji*⁽⁷⁾ referred to in *Rachava v. Kalingapa*⁽⁸⁾. He said of a step-mother: "it is a necessary inference from... *Lallubhai Bapubhai v. Mankuvarbai*⁽¹⁾ that she is entitled to inherit as a *gotraja sapinda*. The latter case as explained by the judgment in *Rachava v. Kalingapa*⁽⁸⁾ must be taken as deciding that the widows of *gotraja sapindas* in the case of collaterals are to be preferred to the male *gotrajas* in a more remote line, and *à fortiori* the widow of a male *gotraja* in the ascending line... will have that preference over such collateral. ... The uncle's sons are indeed mentioned in pl. 4 of Ch. II, sec. 5 of the Mitakshara... but they cannot be regarded as specially mentioned in the succession so as to exclude the operation of the above rule." In *Trikam Purshottam v. Natha Daji*⁽⁶⁾,

(1) (1876) 2 Bom. 388.

(5) (1895) 19 Bom. 707.

(2) (1914) 16 Bom. L. R. 863.

(6) (1911) 36 Bom. 120.

(3) (1879) 4 Bom. 188.

(7) S. A. No. 624 of 1888 (Un. Rep.).

(4) (1884) 9 Bom. 31.

(8) (1892) 16 Bom. 716 at p. 720.

Chandavarkar, J. said: "If once it is conceded that a half-sister is a *gotraja sapinda* she stands nearer to the propositus in the line of heirs than a paternal uncle."

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Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

BHAGWAT BHASKAR KORANNE (ORIGINAL PLAINTIFF), APPELLANT, v.
NIVRATTI SAKHARAM BHADULE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1914.
August 20.

Hindu Law—Debts—Widow—Duty of widow to pay her husband's debts even though time-barred—Widow not bound to pay debts repudiated by her husband in his life-time.

Under Hindu Law, a widow is under a pious obligation to pay her deceased husband's debts, even though they may be time-barred; but she is not bound to pay debts which her deceased husband had repudiated before his death.

SECOND appeal from the decision of G. K. Kanekar, First Class Subordinate Judge with appellate powers at Sholapur, confirming the decree passed by L. K. Nulkar, Second Class Subordinate Judge at Pandharpur.

Suit to recover possession of land.

One Appa was the original owner of the land. He sold it to Ramchandra in 1869. At the same time, the latter passed a *kararpatra* that if Appa repaid Rs. 600 in six annual instalments of Rs. 100 each, he would reconvey the land to Appa.

In 1883, Appa's heirs sued Ramchandra's son Dattatraya to redeem the land, alleging that the *kararpatra* was a mortgage. Dattatraya contested the suit which was dismissed.

* Second Appeal No. 504 of 1913.

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Balkrishna (defendant No. 5), who had purchased Appa's interest in the land, again sued in 1894 to redeem the land. Dattatraya having died, the suit was contested by his mother Jankibai. The suit was dismissed on the ground that it was barred by *res judicata*.

Shortly afterwards, a consent decree was taken out in terms of an agreement under which Jankibai was paid Rs. 650 and Balkrishna was put into possession of the land.

Jankibai having died in 1906, the plaintiff, a reversioner of Dattatraya, filed the present suit to recover possession of the land, alleging that Jankibai had no right to alienate the property beyond her life-time.

The Subordinate Judge dismissed the suit.

On appeal, the District Judge confirmed the decree on the following grounds :—

A woman's estate is not a life estate because she can give an absolute and complete title under certain circumstances. The nature of her estate must be described by the restrictions which are placed upon it and not by the terms of duration. She is not a trustee for reversioners. She is accountable to no one and fully represents the estate and no one has any vested right in the succession as long as she is alive. The limitations upon her estate are the very substance of its nature and are not merely imposed upon her for the benefit of the reversioners. They exist as fully, if there are absolutely no heirs to take after her, as if there were. A widow stands in a different position from that of a manager. The latter can act only with the express or implied consent of the body of members of a joint Hindu family. In the widow's case, the co-parceners are reduced to herself. She can, therefore, do what the body of co-parceners can do subject always to the condition that she acts fairly to the expectant heirs.

Applying these principles to the facts of the case, I am not prepared to hold that plaintiff has any reason as reversioner to question the conduct of the said Jankibai in transferring the suit lands to defendant No. 5 in pursuance of terms of *karpatra*, Exhibit 87, which was passed by her husband and adopted by her son Dattatraya as is apparent from Exhibit 28. The said Jankibai in performing the terms of that *karpatra* and in coming to an amicable settlement in that matter has done that which her husband or her

son or a manager of a joint Hindu family would have done under similar circumstances. *Kararpatra*, Exhibit 87, to which her action is referable is not her document. She has not herself incurred any obligation therein. She filled the ownership of the estate and could deal with it for all purposes consistent with her duty of husbanding its substance honestly for her successors. It was not any breach of duty on Jankibai's part to fulfil the obligations of her husband and son under that *kararpatra*. The estate of the last male holder passed to her as an aggregate property and obligations together and she was fully justified in fulfilling the obligations of her husband and son under that *kararpatra*. It is urged that the claim of defendant No. 5 under that *kararpatra* was time-barred when he presented his application to the conciator of Pandharpur in the matter. I feel grave doubts as to the bar of limitation argued upon. Assuming that the claim was time-barred, the question remains whether decree, Exhibit 31, is liable to be set aside on that ground. I answer that question in the negative. The obligation which rested upon the said Jankibai under *kararpatra*, exhibit 87, could not be obliterated by the circumstance that the law of limitation barred that claim (*Chimnaji v. Dinkar*, I. L. R. 11 Bom. 320; *Bhau v. Gopala*, I. L. R. 11 Bom. 325; *Kondappa v. Subba*, I. L. R. 13 Mad. 189 and *Udai Chunder v. Ashutosh*, I. L. R. 21 Cal. 190).

The true test is whether Jankibai had acted fairly towards the expectant heirs and whether defendant No. 5 had exercised special circumspection in effecting decree, Exhibit 31. That test is fully satisfied in the case.

The plaintiff appealed to the High Court.

P. B. Shingne, for the appellants :—A Hindu widow is entitled to pay her deceased husband's debts though they are time-barred. But this does not mean, that she can revise a claim repudiated by her deceased husband. Here there was no question of paying off any debt.

D. A. Tuljapurkar, for the respondents :—The first two suits failed on an entirely different point. In each of them, the plaintiff alleged that the *kararpatra* was a mortgage and sued to redeem. The *kararpatra* was not held to be inoperative in either suit. Jankibai was therefore entitled to act upon the *kararpatra* and to arrive at an arrangement to carry out its terms.

BEAMAN, J. :—The material facts are that in 1869 Appa, the original owner of this property, sold it to Ram-

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chandra and Ramchandra passed a contemporaneous agreement, Exhibit 87, in the case, under which he agreed that if the vendor Appa paid him Rs. 100 every year for six years he would reconvey the land. So matters stood till after the death of Ramchandra. His son Dattatraya was sued in 1883 by the representatives in interest of the original owner Appa. The suit took the form of a redemption suit, because had it been upon the agreement, merely as an agreement, it is obvious that it would have been time-barred. Dattatraya resisted this suit. His written statement shows that he denied that the agreement had been complied with or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed.

In 1894 after the death of Dattatraya, Jankibai, who as a widow of Ramchandra and mother of the last male holder Dattatraya was in life enjoyment of the estate, was again sued by the representatives in interest of Appa for the redemption of this mortgage. The suit again failed on the very obvious ground that the claim was *res judicata*.

Immediately after this the widow Jankibai appears to have entered into what is called a compromise before the conciliator and allowed a consent-decree against herself for the sale of this land to the representatives of Appa for the sum of Rs. 650. It is this transaction which the plaintiff, who is the reversioner of Dattatraya's estate, seeks to have set aside.

The learned Judge of first appeal relying upon a current of authority, the effect of which simply is that a Hindu widow is under a pious obligation to pay her deceased husband's debts, even though they may be time-barred, held, by what we suppose he meant to be a parity of reasoning, that the widow Jankibai here was under the pious obligation to do for the last holder

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of the estate what he had emphatically declined to do for himself. Now none of the authorities cited by the learned Judge in support of his proposition has the least bearing upon the facts we have to deal with ; nor is there any true analogy between the principle underlying those cases and any principle which could be applied here. Put upon purely ethical, not legal ground, the reasoning of those cases is clear. The Courts have held that a widow is entitled to sell part of the ancestral immoveable property to discharge the just debts of her husband even though those debts might be time-barred, and this is based doubtless upon the moral duty of discharging the debts of her husband ; and again on the assumption that had the husband lived he would as a moral and upright man have discharged them himself. In not one of those cases is to be found the slightest indication that the deceased husband had ever repudiated the debts before his death which the widow paid after his death.

The case here is, therefore, totally different upon moral principle as well as upon its own facts. There is no question of any debt here at all ; nor could it be seriously contended that in acting, as she did, the widow was doing what the last male holder would have done had he been alive, nor can we say that there was the least moral obligation upon the widow to restore this property to the representatives in interest of Appa upon payment of the sum for which it had been sold in the year 1869. That, as soon as the terms of the agreement were exhausted, has been held by the Courts to have been an out and out sale. That was the view which Dattatraya himself took of the transaction when he successfully resisted the attempt of the representatives in interest of Appa to redeem the property ; and if that were so, we are unable to see that the bargain was originally an unfair one or that the last male

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holder Dattatraya was acting in any way dishonestly in insisting upon adhering strictly to the conditions of the original bargain. So that we are unable to find here the slightest ground for applying the principle upon which alone the learned Judge below appears to have thought that this alienation by the widow was justifiable and ought to be sustained against the reversioner.

It has never been contended that there was any legal necessity for this sale in the ordinary sense of those words; and but for a general expression used in the case of *Chimnaji Govind Godbole v. Dinkar Dhondev Godbole*⁽¹⁾ that a widow may deal with the property finally, provided that she is dealing fairly by the expectant heirs, we do not think that the learned Judge would have been misled into the line of reasoning which he has finally adopted. A general expression of that kind can hardly take the place of the settled principles upon which the law governing this class of cases has long been established. Such terms as "dealing fairly by the expectant reversioners" are much too loose and general in our opinion to be made the ground of law governing the widow's powers of disposition during her life-time, of ancestral immoveable property. The only solid ground upon which such alienations are justified and made good against reversioners will be found on analysis in every case to be what is known as legal necessity. Here there is nothing in the least like legal necessity. We are therefore forced to the conclusion that the learned Judge below who has, we think, written a very able and careful judgment has nevertheless entirely misconceived the law, and has, therefore, misapplied it to the facts of the case before him.

(1) (1886) 11 Bom. 320.

We must, therefore, reverse his decision on issue No. 1 and remand the case to the learned Judge below to dispose of upon the remaining points awaiting his decision in the light of the foregoing remarks. In doing so we must observe that the case of the 6th defendant has not been dealt with in the Court of first appeal. The learned Judge should inquire into and decide upon the alleged legal necessity of the mortgage under which the defendant No. 6 claims to hold the property from the widow Jankibai. Costs will abide the final result.

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Decree reversed : case remanded.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

MADHAVRAO KESHAVRAO AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. SAHEBRAO GANPATRAO AND ANOTHER (ORIGINAL
PLAINTIFFS), RESPONDENTS.*

1914.

August 21.

Construction of deed—Simultaneous execution of sale deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale.

The land in dispute was sold by the defendants to the plaintiffs' father on the 7th November 1892 for Rs. 300. On the same day, the latter agreed with the defendants that if they repaid Rs. 300 in five years, he would re-sell the land to them. From 1895 the defendants were in possession of the land as tenants of the plaintiffs and paid Rs. 18 as rent every year. In 1910, the plaintiffs sued to recover possession of the land. The defendants claimed to redeem the lands alleging that the transaction of 1892 amounted to mortgage. The first Court held that the transaction was a mortgage and allowed redemption; but the lower appellate Court held that it was a sale and decreed plaintiffs' claim. The defendant having appealed :—

Held, reversing the decree, that in view of the facts and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale, and that the real intention of the parties was to

* Second Appeal No. 329 of 1913.

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effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale.

SECOND appeal from the decision of Balak Ram, Assistant Judge of Poona, reversing the decree passed by T. R. Kotwal, Subordinate Judge at Talegaon.

Suit to recover possession of land.

On the 7th November 1892, the defendants sold the land in dispute to plaintiffs' father for Rs. 300.

The plaintiffs' father passed on the same day an agreement to defendants, agreeing as follows :—

It is agreed between us that if you both pay Rs. 300 the sale money in five years from today, we shall re-sell the lands to you and will raise no objection. If you do not pay the money in five years, you will have no right to ask for a reconveyance and the right will not avail and the sale-deed taken is to be considered final.

From 1895, the defendants went into possession of the land as tenants of the plaintiffs. The rent Rs. 18 was paid by the defendants every year. The plaintiffs used to pay the assessment which was Rs. 32. The price of the land, *viz.* Rs. 300, was found to be inadequate for the land. The khata of the land which stood in the name of defendants' father, was in 1892 transferred to the name of defendant No. 1.

The plaintiffs sued to recover possession of the land in 1910, relying on the sale-deed of 1892.

It was contended by the defendants that the transaction of 1892 as evidenced by the sale and re-sale amounted to a mortgage and that they should be allowed to redeem it.

The Subordinate Judge held that the transaction was a mortgage and passed a redemption decree in favour of the defendants allowing them to repay the amount of Rs. 300 in annual instalments of Rs. 40 each.

The District Judge on appeal reversed the decree on the ground that the transaction was a sale. He, therefore, decreed the plaintiffs' claim.

The defendants appealed to the High Court.

T. R. Desai, for the appellants :—The two documents being contemporaneous should be read together. When so read, the transaction is clearly a mortgage : see *Jhanda Singh v. Wahid-ud-din*⁽¹⁾ ; *Wajid Ali Khan v. Shafakat Husain*⁽²⁾ ; *Balkishen Das v. W. F. Legge*⁽³⁾ ; and *Maruti v. Balaji*⁽⁴⁾.

The cases of *Bhagwan Sahai v. Bhagwan Din*⁽⁵⁾ and *Ghulam Nabi Khan v. Niaz-un-nissa*⁽⁶⁾ turned on the special words in the document for re-sale. The remarks in *Alderson v. White*⁽⁷⁾ are distinguishable.

The test in such cases is, was there a debt? The amount of rent in usufructuary mortgages usually represents interest payable : see *Nagindas v. Kara*⁽⁸⁾.

A. B. Gumaste, for the respondents :—The construction placed upon the two documents by the lower appellate Court is correct. The mere circumstance that the two documents are of even date is immaterial. There was no pre-existing debt and it does not follow that the present transaction was a mortgage : see *Ghulam Nabi Khan v. Niaz-un-nissa*⁽⁶⁾ ; *Jhanda Singh v. Wahid-ud-din*⁽¹⁾ ; *Bhagwan Sahai v. Bhagwan Din*⁽⁵⁾.

HAYWARD, J. :—The plaintiffs sued as purchasers from the defendants to recover possession of the purchased lands which were subsequently leased to the defendants. The defendants pleaded that the transactions amounted really to a mortgage which they were entitled to redeem, and not to a sale and subsequent lease owing to a contemporaneous agreement for a re-sale.

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(1) (1911) 33 All. 585.

(2) (1910) 33 All. 122.

(3) (1899) 22 All. 149.

(4) (1900) 2 Bom. L. R. 1058.

(5) (1890) 12 All. 387.

(6) (1910) 33 All. 337.

(7) (1858) 2 DeG. & J. 97.

(8) (1904) 6 Bom. L. R. 630.

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The original Court held in all the circumstances that the two documents effected a mortgage and not a sale. The first appeal Court held on a practically similar view of the circumstances that the two documents constituted a sale with an agreement for a re-sale.

The judgment of the learned Subordinate Judge is not as clear as it might have been and consists very largely of a vain repetition of the evidence without any indication of the particular bearing of the evidence quoted upon the issues to be determined. But it appears that the following material facts were held established. On the 16th of September 1892 a relation of defendants sold his interest in the lands for Rs. 300 to one Manikchand. On the 7th of November 1892 defendants bought out Manikchand for Rs. 300 raised by the sale and re-sale in suit. From 1895 onwards the defendants remained in possession as tenants of their purchaser with liability to pay the assessment amounting to Rs. 32 at a nominal rent of about Rs. 50. But as a matter of fact the assessment was not paid by the tenants but by the purchaser, so that the rent actually received was about Rs. 18 only, which would be interest at 6 per cent. on the purchase money Rs. 300, instead of the nominal rent of Rs. 50. There was subsequent to the sale and re-sale a transfer of the names in favour of defendant 1, and not in favour of the purchaser in the revenue records. There was evidence to show that Rs. 300 was a wholly inadequate price for the lands. Two Kulkarnis stated that a fair rent would have been Rs. 75 a year, so that the real value of the lands would have been anything from Rs. 750 to Rs. 1,500. It appears that these were the facts upon which the original Court held that the real intention of the parties in executing the two documents of sale and re-sale was to effect a mortgage and not an absolute sale with agreement of re-sale.

The first appeal Court appears to have accepted these facts generally, though the learned Judge without stating definitely that he considered Rs. 300 a fair price cast some doubt upon the value of the lands as estimated. On those facts he came to the opposite conclusion, namely, that the proper construction of the two documents was that they effected an absolute sale with an agreement for re-sale.

On second appeal to this Court it has been urged that in view of the facts established and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale. We have no doubt in all the circumstances that that is the proper construction and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. It was suggested on the other side that it was not open to us to speculate on the exact relations of the parties in this suit which was in form one between a landlord and tenant, but it appears to us that the real nature of the leases as well as of the transactions of sale and re-sale have been called in question in this litigation, and that we are bound to consider them in view of the very wide terms of section 10A of the Dekkhan Agriculturists' Relief Act.

We must, accordingly, allow this appeal and restore the decision of the original Court and reverse that of the appeal Court. Each party to bear his own costs of both appeals.

BEAMAN, J.:—I concur in the judgment just delivered by my learned brother. I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the parties executing them. Such mort-

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gages are legislatively recognised, and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle, therefore, to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone the result is a mortgage by conditional sale or an out and out sale.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar and Mr. Justice Beaman.

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March 27.

IN THE MATTER OF THE ARBITRATION BETWEEN THE BOMBAY GAS COMPANY, LIMITED AND THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

M. R. JARDINE AND STUART MENTETH, PETITIONERS.

Indian Electricity Act (IX of 1910), sections 14 and 19—Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.

A gas company laid a 3-inch main in a street in Bombay. Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company's cables, by reason of the position of the cables. It was found that the work of laying the cables had not been executed, nor must it be deemed to have been executed, to the reasonable satisfaction of the gas company.

Subsequently the gas company desired to replace their 3-inch main with a 4-inch main and for this purpose opened up the street in question, when they discovered the position of the cables. On account of the position of these cables the gas company were compelled to make a diversion in the route taken

by their 4-inch main and claimed that the electric supply company should pay the cost thereof; the latter company refused to do so.

Held, that the damages, if any, suffered by the gas company were damages recoverable under section 19 of the Indian Electricity Act of 1910 as the damage alleged lay in the gas company being deprived of access to its own property (the main) which was inflicted once and for all when the electric supply company laid their cables over the main, and that it was a question of fact whether such damage had been committed.

Held further, that the gas company were not compelled to proceed under section 14 of the Act and did not lose their remedies against the electric supply company by reason of their not having availed themselves of the provisions of that section.

Quære, whether a licensee causing only as little damage, detriment and inconvenience as may be is liable for damages under section 19 of the Indian Electricity Act (IX of 1910)?

DISPUTES having arisen between the Bombay Gas Company and the Bombay Electric Supply and Tramways Company the same were referred to the arbitration of two arbitrators appointed under section 52 of the Electricity Act of 1910, namely, the petitioners. After hearing certain evidence the arbitrators submitted to the High Court a special case, stating certain questions of law involved in the reference on which they craved the opinion of the High Court pursuant to the provisions of section 10, clause (b), of the Indian Arbitration Act of 1899.

The facts of the case were as follows :—For many years previous to the year 1907 a 3-inch gas main of the Bombay Gas Company ran along Bapu Khote Street on the south side, the level of the top of the main for the distance material in this arbitration being from 2 feet 2½ inches to 2 feet 5 inches below the level of the surface of the road.

Previous to October 1907 the Bombay Electric Supply and Tramways Company had been carrying on through contractors the work of laying electric traction cables in the said street up to within two feet of the said main.

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On the 28th of October 1907 the Bombay Gas Company received written notice that the contractors were about to proceed with the work of laying cables in Bapu Khote Street, such notice being held to have been sufficient notice under section 15 (1) of the Indian Electricity Act of 1903. Thereafter on the 30th of October 1907 and on the following days the contractors carried out the work of laying the abovementioned cables from the point already reached by them and laid their cables in earthenware troughing diagonally over and across the Bombay Gas Company's 3 inch main so as to totally cover the same for the distance of 12 feet and to partially cover the same for the distance of 6 feet 5 inches at the south end and of 4 feet 5 inches at the north end thereof. For the 12 feet where the troughing totally covered the main the level of the bottom of the troughing was 3 to $3\frac{3}{4}$ inches above the level of the top of the gas main; for the 6 feet 5 inches partly covered at the south end the difference between the levels was $1\frac{1}{2}$ to 3 inches; and for the 4 feet 5 inches at the north end the difference was from $3\frac{3}{4}$ to $7\frac{1}{4}$ inches. The work on this site was finished in a week.

No responsible representative of the Bombay Gas Company attended the work as it was going on and it was found by the arbitrators that the work of laying the electric cables at this spot was not executed to the reasonable satisfaction of the Bombay Gas Company nor must it be deemed to have been so executed. It was also found that the 3-inch main for the distance of at least 36 feet was rendered inaccessible for the purpose of removing the same, except by slinging the electric cables, by reason of the position of the latter.

Early in 1913 the Bombay Gas Company being desirous of replacing their 3-inch main with a 4-inch main opened the Bapu Khote Street and found the cables of the Bombay Electric Supply and Tramways Company

in the position above described. Owing to the position of these cables the Bombay Gas Company were compelled to abandon the 3-inch main so far as the same was affected by the cables and laid their 4-inch main to the east of the line of the old main.

The Bombay Gas Company claimed from the Bombay Electric Supply and Tramways Company the cost of the diversion of the gas main but the latter company refused to pay the same. The Bombay Gas Company thereon applied to Government.

The questions of law stated by the petitioners were the following :—

1. Whether upon a true construction of Act IX of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under section 19 of the said Act ?

2. Whether by reason of the Gas Company not having availed themselves of the provisions of section 14 of the said Act they are entitled to any remedy in respect of the position of the cables ?

Strangman, for the Bombay Electric Supply and Tramways Company :—There was no dispute till 1913 when the Gas Company wanted to replace the 3-inch pipe with a 4-inch pipe.

The Gas Company's remedy was to follow the procedure, which was quite feasible, laid down in section 14 of the Act of 1910.

There is damage, etc., caused by reason of the exercise of the powers but not "in the exercise". It is admitted that no damage or inconvenience arose till the Gas Company wanted to lay a new pipe.

The damage must be occasioned at the time : see *Swansea Corporation v. Harpur*⁽¹⁾.

⁽¹⁾ [1912] 3 K. B. 493.

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Under section 18 of the Act of 1903 we are not liable for detriment, etc., but only for damage. Damage means damage over and above as little damage as possible.

If we cut a trench and cause as little inconvenience as reasonably may be we are not liable, but if our conduct is unreasonable we are liable.

The claim is for Rs. 45-12-6; where are the substantial damages required by section 19?

Binning, for the Bombay Gas Company:—Damage must include detriment and inconvenience.

There is no qualification of the word “any” before damage.

The damage occurred when the pipe was laid down and not when we discovered it. In *Swansea Corporation v. Harpur*⁽¹⁾ the work had been done properly; in this case there was default, as the work had not been done to the satisfaction of the Gas Company.

There is no resemblance between this case and the cases contemplated by section 14 which is only a permissive section.

Having damaged our property they want us to pay to make it good.

Nicholson, for the Arbitrators.

Strangman replies:—It is incorrect to say that we have been found to have been in default; we did all that we were bound to do.

It is impossible to suppose that section 19 contemplated any damage, though literal reading of section renders the company liable for any damage they may commit.

The Gas Company were really doing new work.

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⁽¹⁾ [1912] 3 K. B. 493.

The judgment of the Court was delivered by—

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DAVAR, J. :—In the special case submitted to us by the Arbitrators there are two questions for our consideration. In our opinion the first question referred must be answered in the affirmative. Large powers are conferred upon licensees under the Act, but these are accompanied by certain obligations. Thus, under section 19 of the Act of 1910, the licensee is under the obligation of causing as little damage, detriment or inconvenience as may be in exercise of the powers conferred upon him “and shall make full compensation for *any* damage, detriment or inconvenience caused by him or by anyone employed by him”. The question is thus worded :—“Whether upon a true construction of Act IX of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under section 19 of the said Act?” Clearly it is. For the damage claimed to have been suffered lies in the Gas Company having been deprived of access to its own property by acts done by the Supply Company in the exercise of its power. The Supply Company’s contention is that such damage could not be the subject of compensation under section 19 because it was not caused in the “exercise of the power” but was a mere consequence of what was otherwise in all respects rightly done by the Supply Company in the exercise of that power. This, in our opinion, is wrong. Whether there was in fact damage or not, what is alleged as damage was clearly caused once and for all in the exercise of the power conferred upon it by the Supply Company when by laying its wires over the Gas Company’s pipe it cut the latter off from reasonable access to its own property. The case of *Swansea Corporation v. Harpur*⁽¹⁾, cited in support of this contention, is so different, both in its facts and the principle upon which

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it is decided, that we think it unnecessary to discuss it. It is further contended on behalf of the Supply Company that if in the exercise of the powers conferred upon it, it has caused as little damage, detriment or inconvenience as may be, it cannot be liable in damages under section 19. Whether it has, in fact, caused as little damage as may be, is not a question of law but of fact, and must be answered by the Arbitrators. But assuming that that is the true construction of the sentence, notwithstanding the words immediately following "make full compensation for *any* damage" it would still be a question of fact whether and to what extent that minimum damage had been exceeded, and, if exceeded even by one rupee, the licensee would be bound to pay that rupee. The point of the Gas Company's complaint is that more than this minimum of damage, detriment or inconvenience *was* caused by the Supply Company, and that is a question yet to be answered by the Arbitrators.

In our opinion the second question must be answered in the affirmative. What the question really invites us to do, although it might perhaps have been more happily worded and the Honourable the Advocate-General admits this, is to decide whether in this matter the Gas Company was bound to proceed under section 14 or in other words, whether that section applies; for, if it does, there is an end of the Gas Company's case. There could be no claim for damages by the operator against the owner under that section, of the nature of the damages now claimed by the Gas Company. All acts done under that section are done by the operator or by the owner at his request and expense. It is, therefore, perfectly clear that the operator could not claim damages for acts of his own or done on his behalf and at his expense by the owner. Here the claim is quite differently grounded. What in effect the Gas Company complains of is that it was cut off from access to its

own property by acts done in the exercise of its power by the Supply Company, and that those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be.

Costs of the reference to be dealt with by the Arbitrators.

Attorneys for the Arbitrators :—*Messrs. Little & Co.*

Attorneys for the Gas Company :—*Messrs. Crawford, Brown & Co.*

Attorneys for the Bombay Electric Supply and Tramways Company :—*Messrs. Craigie, Blunt & Caroe.*

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

MADHAVRAO MORESHVAR PANT AMATYA (ORIGINAL PLAINTIFF),
APPELLANT, *v.* RAMA KALU GHADI (ORIGINAL DEFENDANT), RESPONDENT.*

1914.
August 26.

Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 13—Revenue Jurisdiction Act (Act X of 1876), section 5, clause (c)⁽¹⁾—Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Suit by an Inamdar against a Khatedar for recovery of sums—Dues—Suit not cognizable by a Small Cause Court—Set-off claimed in a capacity different from that in suit, not allowable.

* Second Appeal No. 798 of 1913.

⁽¹⁾ Section 5, clause (c) of the Revenue Jurisdiction Act (Act X of 1876) is as follows :—

5. Nothing in section 4 shall be held to prevent Civil Courts from entertaining the following suits :—

(a) * * * * *

(b) * * * * *

(c) Suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter

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Sums payable by a Khatedar to an Inamdar as superior holder are dues and a suit to recover such dues, though less than Rs. 500, is not cognizable by a Court of Small Causes and a decree passed in such suit is subject to a second appeal.

In a suit brought by an Inamdar against a Khatedar for the recovery of dues in respect of certain immoveable property payable by the Khatedar, the defendant, as a *pujari* (worshipper), claimed to set off the stipend payable to him by the plaintiff,

Held, that the defendant could not claim the set-off which was due to him in a different capacity from that in which he held as tenant or Khatedar of the plaintiff.

SECOND appeal against the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Ratnagiri, with appellate powers, modifying the decree of E. F. Rego, Subordinate Judge of Malwan.

The plaintiff, as Inamdar, sued to recover from the defendant Rs. 39-6-8 on account of arrears of assessment of four years. He also claimed Rs. 1-14-2 for costs which he had incurred in a suit in the Revenue Court to obtain assistance against the defendant and Rs. 3-11-2 for interest, thus claiming in all Rs. 45.

The defendant answered *inter alia* that he had co-sharers who were necessary parties, that he was a *pujari* (worshipper) of the village temple and for the *puja* (worship) work he was entitled to get Rs. 6-14-6 annually, that the said stipend was deducted from the assessment in previous years, therefore, it should be allowed in the suit, that if the set-off could not be allowed, the defendant claimed the stipend in the present suit and he had paid the Court-fee for the same and that the plaintiff could not recover the costs incurred by him in the Revenue Court.

The plaintiff filed a counter reply denying the defendant's counter claim.

The Subordinate Judge found that the defendant was not entitled to the set-off he claimed, that the plaintiff

could recover his costs in the Revenue Court and that the plaintiff's claim for interest could not be allowed. The Subordinate Judge, therefore, passed a decree for the plaintiff for Rs. 11-12-8 after deducting from Rs. 39-6-8, the arrears of assessment, the amount of the stipend due to the defendant for four years, namely, Rs. 27-10.

On appeal by the plaintiff, the appellate Judge modified the decree of the first Court by adding to it Rs. 1-14-2, the costs which the plaintiff had incurred in the Revenue Court. The decree of the appellate Court was, therefore, in all for Rs. 13-10-10.

The plaintiff preferred a second appeal.

G. S. Rao and *S. Y. Abhyankar* for the appellant (plaintiff).

A. G. Desai for the respondent (defendant):—We have to urge a preliminary objection. The suit being for recovery of arrears of assessment is a suit of the Small Cause nature and the claim being for an amount less than Rs. 500 no second appeal can lie. Article 7 of Schedule II of the Provincial Small Cause Courts Act would not exclude the suit from the jurisdiction of the Court of Small Causes as the suit is not for the assessment of rent, nor would Article 39 of the Schedule help the plaintiff as it applies to the case of a village community only.

Even assuming that this was a suit for rent, which it was not under the ruling in *Sadashiv v. Ramkrishna*⁽¹⁾, such suits have become cognizable by Subordinate Judges as provided for in Article 8 by reason of the Government Notification, No. 5271, of the 15th September 1911, published in the Bombay Government Gazette of the year 1911, Part I, p. 1694, and therefore

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the appeal to the District Court was not maintainable, much less a second appeal.

Rao :—The Inamdar was the superior holder and the tenant, the inferior holder. A sum payable by the inferior holder to the superior holder was “dues” payable to the superior holder by reason of his interest in immoveable property within the meaning of Article 13 of Schedule II of the Provincial Small Cause Courts Act. The term “dues” is used in a similar sense by the Legislature in the Bombay Revenue Jurisdiction Act, section 5, clause (c).

Desai, in reply.

The preliminary objection was over-ruled.

Rao for the appellant (plaintiff) :—We contend that the order granting set-off to the defendant was contrary to the provisions of Order VIII, Rule 6 of the Civil Procedure Code as the amount was not due to the defendant alone but to him and his bhaubands.

Desai for the respondent (defendant) :—We concede that the order awarding set-off was not according to the provisions of Order VIII, Rule 6, but as the plaintiff sued the defendant alone without making the defendant's bhaubands parties for the purpose of escaping from this claim of set-off, the order made by the lower Court was equitable and should be confirmed. The plaintiff having obtained decrees in Revenue Courts against us, it was not at all necessary for him to file the present suit for harassing us.

Rao, in reply :—No doubt we had obtained decrees in the Revenue Court, but it takes a long time to realize the money through the Revenue Court, and as it was likely that the period of limitation for this suit might expire, we filed the suit as a matter of precaution. We are willing to give credit to the defendant for whatever would be recovered in execution of the Revenue decrees.

SCOTT, C. J. :—This is a suit for the recovery by an Inamdar of sums payable by a Khatedar in respect of certain immoveable property held by him, under the Inamdar as his superior holder. It is contended that being for an amount less than Rs. 500, and cognizable by a Court of Small Causes, no second appeal will lie. The question is whether it is cognizable by a Court of Small Causes. We have been referred, on the part of the appellant, to Article 13 of Schedule II of the Provincial Small Cause Courts Act IX of 1887 which excepts from the cognizance of a Court of Small Causes a suit to enforce payment of dues when the dues are payable to a person by reason of his interest in immoveable property. Now the sums payable by an inferior holder to a superior holder in the Bombay Presidency are in another Act of the Imperial Legislature characterised as dues: see Revenue Jurisdiction Act X of 1876, section 5, clause (c). The moneys claimed, therefore, in this suit may appropriately be described as dues payable to the plaintiff by reason of his interest in immoveable property held by the defendant, and therefore Article 13 of the Schedule of the Small Cause Courts Act applies, and this was a suit not cognizable by a Court of Small Causes. We, therefore, over-rule the preliminary objection.

The defendant does not contest the right of the plaintiff to payment of his dues as superior holder, but claims to be entitled to set off the stipend payable by the plaintiff to certain *pujaris* of a temple of whom defendant was one. That stipend was payable to the defendant and his bhau-bands. He, therefore, claims a set-off in a different capacity, in a different category to that in which he holds as tenant or Khatedar of the plaintiff, and he cannot have the set-off having regard to the provisions of Order VIII, Rule 6. We, therefore, set aside the decree of the lower appellate Court which allowed the set-off

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claimed by the defendant. The plaintiff is entitled to Rs. 41-4-10 (Rs. 39-6-8, the amount of his claim, plus Rs. 1-14-2, the amount of costs incurred in the Revenue Court), with further interest upon Rs. 41-4-10. We do not think that he is entitled to his costs because this suit appears to us to have been unnecessarily filed having regard to the fact that he had already obtained decrees in assistance suits.

No order as to costs throughout.

Decree partially set aside.

G. B. R.

APPELLATE CIVIL.

FULL BENCH.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Davar and
Mr. Justice Beaman.*

1914.

August 28.

THOMAS GEORGE GILBERT FRENCH, APPLICANT, v. JULIA FRENCH,
OPPONENT.*

Bombay Civil Courts Act (XIV of 1869), section 16—Indian Divorce Act (IV of 1869), sections 4, 6, 7, 8, and 15—Decree for dissolution of marriage—Assistant Judge—Jurisdiction.

Section 16 of the Bombay Civil Courts Act (XIV of 1869) does not authorize any reference to an Assistant Judge to decide a suit under the Indian Divorce Act (IV of 1869).

REFERENCE under section 17 of the Indian Divorce Act (XIV of 1869) made by S. N. Sathaye, Assistant Judge of Dharwar, for the confirmation of the decree *nisi* in miscellaneous application No. 15 of 1913.

This was a proceeding started by the applicant in the District Court of Dharwar for dissolution of marriage under the Indian Divorce Act. At the time of the

* Civil Reference No. 6 of 1914.

distribution of work in the District Court and the Assistant Judge's Court, the application was transferred for trial and disposal to the Court of the Assistant Judge without the knowledge of the District Judge, and that Court, on inquiry, passed a decree *nisi* which was referred to the High Court for confirmation.

There was no appearance for the parties.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—This is a decree passed by the Assistant Judge of Dharwar for dissolution of marriage under the Divorce Act. The Assistant Judge presumed that he had jurisdiction, believing that the suit had been referred to him for trial by the District Judge under section 16 of the Bombay Civil Courts Act. We have referred to the District Judge and we find that as a matter of fact the case was not referred by him to the Assistant Judge, but it seems to have been sent to the latter by the Clerk of the Court, as though it were a mere matter of administrative routine, and the question of referring it under section 16 was never brought before the District Judge at all.

We are of opinion, however, that even if it had been referred by the District Judge to the Assistant Judge, the latter would have had no power to deal with the case under section 16 of the Bombay Civil Courts Act; for though section 16 empowers the District Judge to refer to the Assistant Judge suits, where the subject-matter does not exceed a certain amount or value, and applications or references under special Acts, it does not, in our opinion, authorise him to refer suits for dissolution of marriage, for we think that such suits cannot be appropriately described as applications under a special Act. They are suits (see sections 4, 6, 7, 8 and 15 of the Divorce Act) but not suits the subject-matter of which is capable of valuation. Being of

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opinion that section 16 does not authorise any reference to an Assistant Judge to decide a suit under the Divorce Act, we must decline to confirm the decree.

Under section 115 of the Civil Procedure Code we set aside the decree which has been passed and remand the case to the District Judge for trial.

Decree set aside and case remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914.

August 31.

DHONDO RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT,
v. BHIKAJI WALAD GOPAL (ORIGINAL DEFENDANT), RESPONDENT.^o

Civil Procedure Code (Act V of 1908), section 11, Explanation IV, Order II, Rule 2—Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—Prior and subsequent mortgages upon the same property by the same mortgagor to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—Res judicata—Finding as a matter of fact that the two mortgages had been transactions "out of which the suit has arisen."

A mortgagee, who has two mortgages of different dates upon the same property, having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage, cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct. This rule is not the result of Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata*.

Per Hayward J. :—If the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen," the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of Order II, Rule 2 of the Code and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

^o Civil Reference No. 5 of 1914.

REFERENCE made by C. Fawcett, District Judge of Poona, under section 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) in Revision Application No. 54 of 1913.

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The reference was made in the following terms :—

I have the honour to refer the following question of law for the determination of their Lordships, *viz.*, whether a mortgagee who has several mortgages on the same property can treat them, with respect to the provisions of Order II, Rule 2 of the Civil Procedure Code, as separate causes of action, or whether they constitute one cause of action, so that if he sues in respect of one of the mortgages, he cannot afterwards sue in respect of an earlier one on the same property ?

The facts out of which the question arises are as follows. In 1903 defendant's grandfather mortgaged his house to the plaintiff, Dhondo. In 1908 he mortgaged the same house and the yard (*bakhhal*) attached to it to plaintiff's brother Sadashiv. In 1911 when Dhondo and Sadashiv admittedly formed a joint family, of which Dhondo was the manager, Sadashiv brought a suit in respect of the mortgage of 1908 with the cognizance and consent of his brother Dhondo. Sadashiv obtained a decree for recovery of Rs. 116-8-0 by sale of the mortgaged property, which decree plaintiff states has not been satisfied. Plaintiff now sues on the prior mortgage of 1903, the cause of action on which arose in 1904. The Sub-Judge of Junnar raised the issue.... "Is the present suit barred under the Order II, Rule 2 of the Civil Procedure Code, in view of the fact that the cause of action on the footing of plaintiff's bond had already arisen in 1911?" This issue he answers in the affirmative, relying on the ruling in *Keshavram v. Ranchhod*, I. L. R. 30 Bom. 156, and the First Class Subordinate Judge, who has reported on the case under section 53 of the Dekkhan Agriculturists' Relief Act, agrees with him.

Assuming that the mortgagee in the case of both bonds was virtually the same in consequence of the plaintiff being joint with his brother Sadashiv in 1911 (and I do not see any sufficient ground to differ from the Sub-Judge on this point), the question still remains whether the claim in respect of the prior mortgage of 1903 was in respect of the same cause of action as the claim in respect of the later bond of 1908, within the meaning of the Order II, Rule 2. This is a point which was left open by the Privy Council in *Sri Gopal v. Prithi Singh*, I. L. R. 24 All. 429 at p. 439, and which I do not understand to have been expressly decided in *Keshavram v. Ranchhod*, where (at page 163) reference is expressly made to the query raised in the former case. Also, as I read *Keshavram's* case, the determination of this particular question was not necessary for the exact point raised in that case, *viz.*,

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Whether plaintiff in that suit could maintain a suit to recover the sum due on a later mortgage by sale of the property subject to a prior mortgage (*cf.* the remarks as to this in *Gobind Pershad v. Harihar Charan*, I. L. R. 38 Calcutta 60 at p. 63). I do not, therefore, think that *Keshavram's* case can be taken as a binding ruling that Order II, Rule 2 applies even though the causes of action are different in regard to the two mortgages. It seems to me that the cause of action can only be considered to be the same if the prior mortgage became merged in the later mortgage; but the law is that a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances (*see* Halsbury's Laws of England, Vol. 21, p. 326). I may also refer to Mulla's Code of Civil Procedure, 5th edition, p. 333 and Ghose's law of mortgage, 4th edition, p. 594, in support of the doubt I feel as to the correctness of the view taken by the two Subordinate Judges. As the point is an important one and it is not, in the view I take, clearly covered by the ruling in *Keshavram's* case, I submit I am justified in making this reference in spite of what was said in *Bhanaji v. De Brito*, I. L. R. 30 Bom. 226.

My own opinion for the reasons already given is that the suit is not barred by Order II, Rule 2; but at the same time as the defendant is an agriculturist, it is doubtful whether (in view of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act, under which an account between the parties has to be taken from the commencement of the transactions between them) there was not an implied obligation on Dhondo and Sadashiv to have joined in one suit against the defendant in respect of the two mortgages as is allowed by Order II, Rule 2, and whether as they have not done so, the present suit is not barred. This also is a point of law on which I feel a reasonable doubt and which I would venture to refer for the decision of the High Court, should they agree with my opinion on the other point. I am inclined to think it should be answered in the affirmative, *i. e.*, that the suit is barred.

B. V. Desai (amicus curiæ) for the appellant (plaintiff):—The question is whether Order II, Rule 2 of the Civil Procedure Code is a bar to the present suit. It refers to more reliefs than one in respect of the same cause of action. If there are different causes of action, then the Rule does not apply. Here there are two separate mortgages, one of 1903 and the other of 1908. Before the mortgage of 1908 the plaintiff could have brought a suit on the mortgage of 1903. Therefore in the present case it cannot be said that there is only one cause of action in respect of the two mortgages and if

there are two causes of action, then clearly the Rule is not a bar to the present suit.

In the case of *Sri Gopal v. Pirthi Singh*⁽¹⁾ their Lordships of the Privy Council left open the question in connection with section 43 of the Code of 1882. The cases which apparently lay down that section 43 is a bar are cases under a mortgage and their Lordships of the Privy Council in deciding whether section 43 is a bar have not interpreted the section by itself but have read it along with section 85 of the Transfer of Property Act. That section requires that all persons interested in the mortgage should be parties to the suit. The ruling in *Keshavram v. Ranchhod*⁽²⁾ is to the same effect. In that case what was mortgaged a second time was the surplus of the previous debt and the first mortgage was clearly mentioned in the second. All the cases prior to 1908 have lost their binding authority because section 85 of the Transfer of Property Act, which was applicable to such transactions, has been repealed and it is re-enacted in Order XXXIV, Rule 1 of the Civil Procedure Code of 1908 with the addition of an explanation which distinguishes all the previous cases. The explanation clearly shows that in a suit by a puisne mortgagee, the prior mortgagee need not be joined. Therefore section 85 of the Transfer of Property Act being no longer a bar to a suit like the present, section 43 of the old Code can also be no longer a bar. The decision in *Gobind Pershad v. Harihar Charan*⁽³⁾ shows that a person holding several mortgages can bring a suit on a prior mortgage without joining the claims on later mortgages.

V. V. Bhadkamkar (amicus curiæ) for the respondent (defendant) :—The present suit is clearly barred by

⁽¹⁾ (1902) 24 All. 429 at p. 433.

⁽²⁾ (1905) 30 Bom. 156.

⁽³⁾ (1910) 38 Cal. 60.

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Order II, Rule 2 corresponding with section 43 of the Code of 1882. Here the same person holds different mortgages on one and the same property. He may bring a suit on a subsequent mortgage and may sell the property in execution of his decree with the result that the property may fetch less than its actual value because there is a subsisting prior mortgage. The object of section 85 of the Transfer of Property Act was to protect the interests of *bona fide* purchasers: *Hari Narain Banerjee v. Kusum Kumari Dasi*⁽¹⁾. In *Gobind Pershad v. Harihar Charan*⁽²⁾ it was held that such a suit can lie but it was held at the same time that the plaintiff cannot ask for a decree subject to the subsequent mortgage, meaning thereby that if he brings a suit on the other mortgage, the suit would be barred.

The decision in *Nattu Krishnama Chariar v. Annangara Chariar*⁽³⁾ also shows that if a mortgagee omits to mention his second mortgage, he cannot afterwards sue on his second mortgage.

Desai in reply :—The ruling in *Nattu Krishnama Chariar v. Annangara Chariar*⁽³⁾ was arrived at before section 85 of the Transfer of Property Act was repealed and incorporated in the explanation to Rule 1, Order XXXIV of the Civil Procedure Code. Moreover, in the present case the property is not ordered to be sold but the decretal amount is made payable by instalments.

The case of *Payana Reena Saminathan v. Pana Lana Palaniappa*⁽⁴⁾ gives the meaning of the words "causes of action". Section 34 of the Ceylon Civil Procedure Code is the same as Order II, Rule 2 of the Indian Civil Procedure Code of 1908. We submit that the present suit is not barred by Order II, Rule 2.

(1) (1910) 37 Cal. 589.

(2) (1910) 38 Cal. 60.

(3) (1907) 30 Mad. 353.

(4) [1914] A. C. 618.

BEAMAN, J. :—This is a Reference by the District Judge of Poona under section 54 of the Dekkhan Agriculturists' Relief Act. The principal question referred to us, put in the simplest language, is whether a mortgagee having two mortgages of different dates upon the same property may sue upon the mortgage of later date first, and having had the property sold without reference to the prior mortgage can thereafter bring a separate suit on the prior mortgage. We think that he cannot do so. In our opinion the question is not to be answered under Order II, Rule 2. The causes of action certainly are distinct. It could hardly be seriously contended, we think, that in such circumstances if the mortgagee allowed the prior mortgage to be time-barred, he could not sue upon the puisne mortgage, or again, that by doing so he could revive the prior mortgage which had become time-barred. Thus, it is clear, that the causes of action are not the same. The answer then will have to be sought by reference, we think, to the general principles of the law of mortgage and *res judicata*. The rule is that where there are several mortgages upon the same property, any mortgagee suing upon his mortgage must make all the other mortgagees, as well as the mortgagor, parties to the suit. To this rule there are exceptions. Until the alteration of section 85 of the Transfer of Property Act by Order XXXIV, Rule 1, the Courts appear to have put a very strict interpretation upon the words of old section 85 of the Transfer of Property Act. But there can be no doubt that under the general law of mortgage as administered in England a puisne mortgagee might sue his mortgagor, if he chose to do so, for foreclosure and sale, without making a prior mortgagee a party to the suit, and the result of such a suit between a puisne mortgagee and his mortgagor would be to have the property sold, as it is said, subject to the prior mortgage.

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Accurately stated in all cases of that kind what is really sold is not the property at all but the right to redeem the prior mortgage upon it.

Similarly when a puisne mortgagee sues the mortgagor and joins a prior mortgagee, the effect of the suit between the puisne mortgagee and the mortgagor is exactly the same as though the prior mortgagee had not been a party to it, assuming (1) that the mortgagee has insisted upon his rights ; (2) that neither the puisne mortgagee nor the mortgagor has redeemed him in the suit. Then the result would be that the property would be sold subject to that prior mortgage as between the puisne mortgagee and the mortgagor. In other words again, what would be sold would not be the property but the right to redeem the prior mortgagee. It is equally clear, we think, that in a suit so framed if the prior mortgagee did not choose to assert his rights, although a party to the suit, the result would be that the property would be sold free of that mortgage, and that the prior mortgagee would be disentitled to assert any rights he might otherwise have had under his prior mortgage against a purchaser at any such sale. That rule depends upon the principle of *res judicata*. This is very clearly apparent from the dicta of their Lordships of the Privy Council in *Sri Gopal v. Prithi Singh*⁽¹⁾.

In our opinion, precisely the same result is worked out where the puisne mortgagee suing on his puisne mortgage is himself a prior mortgagee. By no stretch of fictional forms or fictional ideas can it be said, we think, that in such circumstances he is not a party to the suit. He is just as much a party as though he had been impleaded by a puisne mortgagee other than himself. So that where a mortgagee holds two mort-

⁽¹⁾ (1902) 24 All. 429.

gages of different dates upon the same property, and sues upon the later mortgage, he must be deemed to be a party to the suit in a position to assert any rights he might have under his prior mortgage. There might be no objection in such circumstances to his reserving those rights, as though he and the prior mortgagee were different persons, and so have the property put to sale subject to the prior mortgage. But if he makes no mention of his rights as prior mortgagee, then he is in the same position, we conceive, as a prior mortgagee would be, if being duly impleaded, he did not attempt to assert his rights. In such cases the decision in *Sri Gopal v. Prithi Singh*⁽¹⁾ is conclusive, establishing that such a prior mortgagee would be precluded from bringing another suit upon his prior mortgage against the purchaser at the sale; that is to say, the matter would be *res judicata* against the prior mortgagee.

This being our view, it follows that we must answer the question asked us by the learned District-Judge in the negative. He has referred to us a subsidiary question under the special provisions of section 13 (b) of the Dekkhan Agriculturists' Relief Act upon which, I believe, my brother Hayward will express our opinion, though in the view we take, it is not essential to the decision of the suit upon which the first question has been referred to us.

We wish to express our thanks to the learned gentlemen who afforded us much assistance as *amici curiæ* during the argument.

HAYWARD, J.:—I entirely concur with regard to the first question that prior and subsequent mortgages in favour of one mortgagee cannot be considered one cause of action so as to bar separate suits under Order II, Rule 2. They must, in my opinion, ordinarily

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constitute two different causes of action, as causes of action are said to comprise all facts material to prove the particular suits, and, clearly in the case of separate mortgages, there would be different facts which would have to be proved to establish the separate suits. So that there could be no bar to separate suits under Order II, Rule 2.

I also concur with regard to the further question which thereon arises, that the prior mortgage must be considered as necessarily brought in by way of defence in a suit on the subsequent mortgage in favour of the same mortgagee under Order XXXIV, Rule 1, and that failure to plead the prior mortgage in the suit on the subsequent mortgage would give rise to *res judicata* under section 11, Explanation IV, of the Civil Procedure Code. The several decisions quoted before us in support of this proposition, namely, *Dorasami v. Venkataseshayyar*⁽¹⁾; *Keshavram v. Ranchhod*⁽²⁾; and *Hari Narain Banerjee v. Kusum Kumari Dasi*,⁽³⁾ all proceeded on the assumption that prior mortgagees were in all cases necessary defendants in suits brought by subsequent mortgagees under section 85 of the Transfer of Property Act. But it has since been made clear that they are not necessary defendants and that it is a matter of the choice of the subsequent mortgagees by the Explanation to Order XXXIV, Rule 1 of the Civil Procedure Code. So the further question which has arisen must be thus stated: whether the prior mortgagee can practically be left out of the suit by the subsequent mortgagee where the two mortgages are vested in the same mortgagee, so as to avoid the penalty of *res judicata* which would otherwise result under the decision of the Privy Council in *Sri Gopal v. Prithi Singh*⁽⁴⁾.

⁽¹⁾ (1901) 25 Mad. 108.⁽³⁾ (1910) 37 Cal. 589.⁽²⁾ (1905) 30 Bom. 156.⁽⁴⁾ (1902) 24 All. 429.

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The matter is in my opinion not free from difficulty, but after consideration it does not seem to me practicable to hold the prior mortgagee in such a case not to be a party, when he is himself actually represented in the case, with full knowledge of the prior mortgage as subsequent mortgagee. Nor would there be any prejudice to him in so holding because he would be able, if he so desired, to keep his prior mortgage alive by requiring that the sale of the property should be subject to the prior mortgage, or in the alternative he might allow the sale free of the prior mortgage and recover the amount due on the prior mortgage out of the proceeds of the sale on the subsequent mortgage. This is clear from the provisions of Rules 12 and 13 of Order XXXIV. On the other hand, if the prior mortgagee were held in such a case not to be a party and not bound to disclose his prior mortgage though himself the subsequent mortgagee, the ruling would, in my opinion, open the door to possible fraud in the subsequent dealings with the property and would tend to defeat the general policy of finally settling all questions regarding mortgaged property in one suit, and of limiting litigation, underlying the various provisions of the Transfer of Property Act and the Civil Procedure Code.

With regard to the subsidiary question whether in any case the prior mortgage and the subsequent mortgage must not be held to be one cause of action in view of the special provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, it is not strictly necessary, in view of our decision on the preceding questions, to come to any definite decision; nor does it appear to me that the materials before us are sufficient to enable us to arrive at such a decision. It will be sufficient, therefore, merely to indicate that it would depend on the question of fact, as pointed out in the

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decisions in *Mahadu v. Rajaram*⁽¹⁾ and *Gopal Purushotam v. Yashwantrao*⁽²⁾ whether the two mortgages can be said to be independent transaction or transactions "out of which the suit has arisen" within the meaning of section 13 of the Dekkhan Agriculturists' Relief Act. If it had been found as a matter of fact that the transactions were transactions "out of which the suit has arisen", then they would have constituted the same cause of action, and the subsequent suit would have been barred under Order II, Rule 2, by reason of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

So that the reply to the questions put to us must, in my opinion, be that the subsequent suit on the prior mortgage was barred by reason of the decree in the previous suit on the subsequent mortgage as *res judicata* under section 11, Explanation IV, of the Civil Procedure Code, and that in any case, if the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen", the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provision of Order II, Rule 2, and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

Order accordingly.

G. B. R.

⁽¹⁾ (1887) P. J. 216.

⁽²⁾ (1887) P. J. 273.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward

PURUSHOTTAM DAJI MANDLIK (ORIGINAL DEFENDANT), APPELLANT, v.
PANDURANG CHINTAMAN BIWALKAR (ORIGINAL PLAINTIFF),
RESPONDENT.*

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September 1.

Specific Relief Act (I of 1877), section 39—Indian Evidence Act (I of 1872), section 52—Civil Procedure Code (Act V of 1908), section 100, Order VI, Rule 6—Suit to set aside a sale-deed—Specific allegations of coercion made in the plaint—Allegations disbelieved—Different kind of coercion held probable on other circumstances and doubts—Finding not secundum allegata et probata—Substantial error in procedure—Ground for setting aside what might otherwise be a conclusion of fact.

Plaintiff sued the defendant to set aside a sale-deed on the ground of coercion of a particular kind under section 39 of the Specific Relief Act (I of 1877). Both the lower Courts disbelieved the allegations of coercion made in the plaint, but granted relief to the plaintiff on the ground that on a consideration of other circumstances the plaintiff must have been deceitfully decoyed into going quietly and privately to the defendant's *mandap* (open shed) and there through fear of possible violence made to sign the document.

On second appeal by the defendant,

Held, reversing the decree and dismissing the suit, that a suspicion of some kind or other undefined coercion was not sufficient to support the plea of coercion, the plea being not *secundum allegata et probata*.

Motee Lall Opudhiya v. Juggurnath Gurg⁽¹⁾, *Eshenchunder Singh v. Shamachurn Bhutto*⁽²⁾ and *Balaji v. Gangadhar*⁽³⁾, referred to.

Per Hayward J. :—Where fraud or coercion are alleged, detailed particulars must be given in the pleadings and parties must be strictly confined to that state of facts.

Where particulars of coercion alleged are wholly rejected and evidence disbelieved, and a vague and different kind of coercion is held to have been probable on other circumstances and doubts, there is a substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law.

* Second Appeal No. 119 of 1913.

⁽¹⁾ (1836) 5 W. R., P. C. 25.

⁽²⁾ (1866) 11 Moo. I. A. 7.

⁽³⁾ (1908) 32 Bom. 255.

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Per Beaman J. :—A plaintiff who comes to Court alleging fraud or coercion in respect of which the law requires him to give particulars and he being disbelieved upon every material one of them cannot be given relief.

When a finding is absolutely unsupported by any evidence at all, that is a ground for setting aside what might otherwise be a conclusion of fact.

When the Court has found a case required to be made by the plaintiff not proved and has found another case unsupported in its most essential point by any evidence at all, proved, and so substituted the latter for the former, there is a substantial error in procedure under section 100 of the Civil Procedure Code (Act V of 1908)

SECOND appeal against the decision of J. D. Dikshit, District Judge of Thana, confirming the decree of V. S. Nerurkar, Subordinate Judge of Murbad.

The plaintiff sued for a declaration that a sale-deed passed by him to the defendant was void for want of consideration and that it was taken from him under coercion by the defendant. The plaintiff alleged that the defendant, with the object of getting the plaintiff's signature to the sale-deed by force, came to the plaintiff's house at night on the 29th November 1908 and with the assistance of six men forcibly carried away the plaintiff to the defendant's *mandap* (open shed), severely beat him and made him put his signature to the document which was already written, that the plaintiff, thereupon, filed a complaint against the defendant before the First Class Magistrate, Kalyan, on the 1st December 1908, that the first Class Magistrate committed the case to the Sessions Court at Thana which acquitted the defendant, that the defendant also had filed a complaint against the plaintiff to the effect that the plaintiff had, on the 29th November 1908, entered the defendant's house at night for committing a theft of the sale-deed but the plaintiff was acquitted by the First Class Magistrate who heard both the complaints and that the plaintiff's signature to the sale-deed having thus been taken by force and the plaintiff

not having got any consideration for it, the document was null and void against him. Hence the suit.

The defendant answered *inter alia* that the plaintiff voluntarily passed the sale-deed in defendant's favour for Rs. 995, that out of the said sum the plaintiff was paid by the defendant Rs. 400 by way of earnest money, that on the 20th September 1908 the plaintiff was paid Rs. 500 more and he executed the sale-deed, that the plaintiff with the object of swallowing the amount of Rs. 900 paid to him by the defendant, once entered the defendant's house at night and stole away the sale-deed, other papers and articles, that the defendant, therefore, prosecuted the plaintiff before the First Class Magistrate who acquitted him, that the defendant was also prosecuted by the plaintiff who was, however, acquitted by the Sessions Court at Thana, that after the prosecutions had ended, the sale-deed was presented by the defendant to the District Registrar for registration and it was duly registered, that the defendant had already paid Rs. 900 to the plaintiff for the sale-deed and he was ready and willing to pay the balance of Rs. 95 and that the plaintiff's suit was false and should be dismissed.

The Subordinate Judge found that the plaintiff's signature to the sale-deed, Exhibit 12, was taken by the defendant by force and violence, that it was not proved by the defendant that the plaintiff passed the deed in suit for consideration and voluntarily and that the plaintiff was entitled to have the sale-deed cancelled. The following decretal order was, therefore, passed :—

I, therefore, adjudge that Exhibit 12 mentioned in the plaint is void and order it to be delivered up and cancelled, the signature of plaintiff upon it having been taken by defendant under coercion and no money having been paid thereunder to plaintiff.

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I further order that defendant do pay all costs of plaintiff and that a copy of the decree of the Court be sent to the officer in whose office the document Exhibit 12 has been registered.

In his judgment the Subordinate Judge remarked :—

The circumstances referred to above point to the conclusion that plaintiff must have put his signature on Exhibit 12 under coercion. That some sort of violence was used against plaintiff is apparent from the evidence of the Sub-Assistant Surgeon (Exhibit 64), examined in this case. I have already stated that plaintiff has given an exaggerated account of the violence done to him and has failed to prove it. The deposition of Exhibit 64, however, proves that some violence was used against plaintiff and it might have been that plaintiff affixed his signature out of fear of further violence. No stronger proof of the violence can be expected in this case. The circumstances warranted above prove that plaintiff must have made his signature to Exhibit 12 under coercion and not voluntarily and that no money was paid to plaintiff by defendant.

Plaintiff is therefore entitled to have the deed (Exhibit 12) set aside. Plaintiff has brought the present suit under section 39 of the Specific Relief Act for having Exhibit 12 adjudged void. Defendant's pleader takes objection to the maintainability of the suit under section 39 of the Specific Relief Act. * * * Defendant's pleader urges that plaintiff has admitted in his deposition before the Court that he has parted with ownership in the plaint property in favour of his purchasers and that no property is left with him at present. The learned pleader cites I. L. R. 13 Madras 549 in support of his contentions and urges that plaintiff having no interest in the property mentioned in exhibit 12 has no "reasonable apprehension that such instrument, if left outstanding, may cause him serious injury." I, however, think that plaintiff has a right to bring the present suit. He has, no doubt, transferred his property in favour of strangers. He, however, says that he has passed sale-deeds in favour of his father-in-law, not for any consideration received by him, but simply to force out Exhibit 12 into publicity as he had suspected that defendant has got it written in his name. It cannot therefore be said that plaintiff has no interest in the property left. His father-in-law does not come and say that plaintiff has sold some property to him for consideration. Then again plaintiff has sold parts of the property to different persons and these persons are likely to sue him if defendant dispossesses them on the strength of Exhibit 12. Plaintiff then has reasonable apprehension that Exhibit 12, if left outstanding, would cause serious loss to him. His case is governed by the ruling reported in I. L. R. 23 Bombay 375 in which the Madras ruling quoted by defendant's learned pleader is referred to and not quite approved of by their Lordships.

On appeal by the defendant the District Judge found that the plaintiff was entitled to the relief by can-

cellation of Exhibit 12 and that the plaintiff was entitled to maintain the suit having regard to the fact that he had no subsisting interest in the property at the time of the institution of the suit. On the said findings the decree was confirmed. The District Judge observed :—

The learned Sub-Judge has entered into a thorough-going and painstaking inquiry and carefully considered all the evidence and the arguments adduced in the case ; and I see no reason to differ from the conclusions to which he has come. It was argued that the Sub-Judge made for the plaintiff a case which he had not set up. I do not see much force in the argument. No doubt the facts may have been a little exaggerated, or the plaintiff may not have been able to substantiate all the allegations made by him, for reasons which it is not possible to explain, but all the facts and circumstances point to but one conclusion, that the plaintiff's signature on the sale-deed must have been obtained by force and against his will. The defendant has been proved to be a bully and he at one time had actually attempted to attack his adopted father. Since his father's death he has nearly disposed of all his property and reduced himself to penury and is now seeking to go behind the solemn document which he and his father executed in plaintiff's favour by trying to set up an oral agreement in derogation of the deed and fabricating on the strength of such an unfounded agreement a document like Exhibit 12.

The defendant preferred a second appeal.

B. G. Kher for the appellant (defendant):—The plaintiff sued to have the sale-deed in suit set aside on the ground that it was obtained from him by the use of violence and in his pleadings he gave all the material particulars of the violence used. The lower Courts entirely disbelieved the plaintiff's evidence and found that violence could not have been exercised in the manner alleged by the plaintiff and yet they decreed his claim on the ground that the circumstances of the case made it probable that violence must have been used, if not in the manner alleged, in some other unknown manner. This is a substantial error in procedure.

Order VI, Rule 4 of the Civil Procedure Code makes it incumbent on the plaintiff to give particulars in cases

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where undue influence, fraud, &c. are alleged. When the plaintiff gives such particulars he should not be allowed to make out and to succeed on a different and new case not raised in the pleadings. If the Court makes out for a party a case not set up by him and not warranted by the evidence, the High Court can, in such a case, even set aside a finding of fact. *Shivabasava v. Sangappa*⁽¹⁾, *Ram Gopal v. Shamskhaton*⁽²⁾, *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopal*⁽³⁾. In *Motee Lall Opudhiya v. Juggurnath Gurg*⁽⁴⁾ the Privy Council have laid down that when duress or fraud is alleged the onus is on the plaintiff to prove his allegations. Mere possibility or even probability that there may have been such an origin of the transaction is not sufficient for setting aside an instrument.

The issues regarding coercion were irregularly framed and were unnecessarily wide and vague. Besides, the onus of proving voluntary execution of the sale-deed and consideration for the same was wrongly thrown on the defendant. This was a material irregularity and it resulted in substantial injustice. The lower Courts merely inferred coercion because defendant failed to prove consideration and voluntary execution of the deed. This is wrong. *Kalepershad Tewarree v. Rajah Sahib Perhlad Sein*⁽⁵⁾.

¶ The plaintiff could not maintain this suit under section 39 of the Specific Relief Act. At the time of the suit he had no interest in the property. He had already conveyed the whole of it to others. Such suits are allowed on the principle of *quia timet* where there is no actual injury but only fear of such injury. Such apprehension must, however, be "reasonable". A

⁽¹⁾ (1901) 29 Bom. 1.⁽³⁾ (1899) 23 Mad. 227.⁽²⁾ (1892) L. R. 19 I. A. 228.⁽⁴⁾ (1836) 5 W. R., P. C. 25.⁽⁵⁾ (1869) 12 Moo. I. A. 282.

person, who seeks to set aside a deed relating to property to which he has absolutely no title, cannot be said to have "reasonable apprehension" that such a deed, if left outstanding, may cause him serious injury: *Banerji on Specific Relief*, pp. 601 and 607.

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A covenant of title and indemnity by the transferor to the transferees is not sufficient to cause "reasonable apprehension": *Jhuna v. Beni Ram*⁽¹⁾, *Iyyappa v. Ramalakshamma*⁽²⁾.

The case of *Kotrabassappaya v. Chenvirappaya*⁽³⁾ is distinguishable. The decision of every case must depend on its own circumstances and facts.

G. S. Rao for the respondent (plaintiff):—Both the lower Courts have found as a fact that the sale-deed in suit was obtained under coercion. The correctness of that finding cannot be impeached in second appeal. There was no substantial error or defect in procedure. Both the lower Courts have considered the evidence and decided that the document could not have been passed voluntarily. The issues raised were quite plain. What has to be looked at is the substance of the pleadings and not every minor detail: *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*⁽⁴⁾, *Amrito Lall Dutt v. Surnomoye Dasse*⁽⁵⁾. Surrounding circumstances are valuable as evidence. It has been held by the Privy Council as well as by all the High Courts that except as provided in section 100 of the Civil Procedure Code an appeal will lie to the High Court only on a question of law: *Mussummat Durga Choudhrain v. Jawahir Singh Choudhri*⁽⁶⁾, *Balkrishna v. Govind*⁽⁷⁾,

(1) (1887) 9 All. 439.

(4) (1856) 6 Moo. I. A. 393 at p. 410.

(2) (1890) 13 Mad. 549.

(5) (1897) 24 Cal. 589.

(3) (1898) 23 Bom. 375.

(6) (1890) L. R. 17 I. A. 122.

(7) (1902) 26 Bom. 617.

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Pandurang v. Anant⁽¹⁾ and *Bal Kishen v. Jasoda Kuar*⁽²⁾. Besides substantial justice has to be done. The medical evidence in the case, the trembling nature of the signature and the delay in presenting the document for registration clearly point to only one conclusion. —

All the documents, namely, the sale-deed and two other documents connected with it, contain indemnity clauses. The plaintiff has "reasonable apprehension" that he may be sued by the defendant for the return of the purchase-money and also for damages for selling him the property already sold to other persons. Further, there is the danger of the vendees suing the plaintiff for the return of their purchase-money. The ruling in *Jhuna v. Beni Ram*⁽³⁾ has no application. The Bombay High Court has held in *Kotrabassappaya v. Chenvirappaya*⁽⁴⁾ that it is not absolutely necessary for the plaintiff to have some interest in the property so that he may be able to sue under section 39 of the Specific Relief Act. The ruling in *Iyyappa v. Ramalakshamma*⁽⁵⁾ was considered there and disapproved.

HAYWARD, J.:—The plaintiff sued the defendant to set aside a sale-deed on the ground of coercion under section 39 of the Specific Relief Act. The plaintiff stated in the plaint that he was able to write his signature, and that the defendant with the object of getting that signature by force came to his house on the night of the 29th November 1908, and with the assistance of six men forcibly carried him away to the defendant's *mandap*, severely beat him and made him sign his name on the document. The plaintiff further alleged in his deposition that on the night of 29th November 1908 he was sitting in his Court-yard after

⁽¹⁾ (1903) 5 Bom. L. R. 956.⁽³⁾ (1887) 9 All. 439.⁽²⁾ (1885) 7 All. 765.⁽⁴⁾ (1898) 23 Bom. 375.⁽⁵⁾ (1890) 13 Mad. 549.

taking his supper, when the defendant, who was helped by five other men, at once came up to him, gave him a blow, and asked him to sign a document shown him by defendant ; that, on his persisting in refusing to sign it, he was picked up bodily by the defendant and his five comrades and taken to the *mandap* in front of the house of the defendant which was near by, and was there kicked and struck with blows so very severely that he nearly lost his consciousness ; that his wife, who had witnessed from inside her house the assault committed on her husband, followed him when he was removed by the defendant and his comrades, crying for help all the while ; that the wife, who was prevented by the threats of the defendant from entering the *mandap*, finding her husband being mercilessly kicked and struck with blows, cried out from the place where she was standing and advised him to sign the document rather than lose his life on account of the thrashing he was subjected to ; that he, thereupon, put his signature to the document.

The defendant's allegation was that on the night in question the plaintiff entered his house with the object of stealing this particular document, and that whilst plaintiff was about to run away with a bundle containing this and other connected papers, he was arrested with the help of the defendant's companions.

The learned Subordinate Judge held that the plaintiff's story was not proved, and in so doing remarked that "his story as it has been unfolded in his deposition and in the depositions of his witnesses is incredible. I, therefore, come to the conclusion that the plaintiff's allegations regarding the violence used towards him and his having been subjected to severe beating are not proved. The facts show that if plaintiff was subjected to any violence by the defendant it would not have been in the manner described by the plaintiff and his

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witnesses." The learned Judge then proceeded to consider certain other circumstances leading up to the document in dispute, and came to the conclusion that some other kind of coercion must have been caused in consequence of which the document was signed, and he relied in coming to this conclusion very largely on his disbelief of the counter story of the theft told by the defendant. He remarked that "the defendant says that plaintiff had entered his house with the object of stealing the document and whilst plaintiff was about to run away with a bundle of papers he was arrested. The defendant's story is that plaintiff and his comrades stole away the sale-deed" but in view of the other circumstances he came to the conclusion that "the defendant's story regarding the theft falls to the ground." The learned Judge accordingly gave a decree for cancellation of the document upon these final grounds :—

The irresistible conclusion, therefore, is that plaintiff must not have voluntarily signed the document. He must have been made to sign it against his will. Of course the evidence of violence is not satisfactory. I think the evidence in the case is bound to be unsatisfactory. The defendant is not expected to be so very stupid as to openly practise violence on plaintiff. It must have been done by him privately in his house by enticing plaintiff to come there. Plaintiff must have gone voluntarily to defendant's house with his turban on, and it was there that the document was ready written, and in the presence of the attesting witnesses and the writer plaintiff's signature was taken on that night, and in accordance with the plan previously laid out, the cry was then raised of theft by the defendant. I have already stated that an exaggerated account of the violence done has been given; that the Doctor proved that some violence was used against plaintiff, and it might have been that plaintiff affixed his signature out of fear of further violence. No stronger proof of the violence can be expected in this case. The circumstances warranted above prove that plaintiff must have made his signature to the document under coercion.

The learned District Judge on first appeal appears to have taken the same view and confirmed the decision. He did not go into the evidence in detail, but said this :

No doubt the facts may have been a little exaggerated, or the plaintiff may not have been able to substantiate all the allegations made by him, for reasons

which it is not possible to explain, but all the facts and circumstances point to but one conclusion, that the plaintiff's signature on the sale-deed must have been obtained by force and against his will.

He then briefly referred to the other circumstances and recorded his disbelief in the story of the theft set up by the defendant. He also appeared to rely on further unconnected circumstances said to indicate the bad character of the defendant.

On second appeal to this Court, the contention in substance has been that it was contrary to the procedure prescribed by law to reject the evidence adduced in support of the plaintiff's specific allegations of coercion and to hold on a consideration of other circumstances and a disbelief of the story of the defendant that there must have been some other undefined kind of coercion. This contention has, in our opinion, been shown to have been well founded by the detailed extracts just recited from the pleadings and the judgments. They have indicated beyond doubt that the specific allegations were that the plaintiff was carried off openly by force and severely beaten and under violent compulsion made to sign the document. These allegations were all disbelieved and the surprising result was arrived at, on a consideration of other circumstances, that the plaintiff must have been deceitfully decoyed into going quietly and privately through fear of possible violence, and made to sign the document. These other circumstances have not been clearly arranged either in the rambling judgment of the learned Subordinate Judge or in the brief references of the District Judge. But they would appear so far as we have been able to gather as follows:—

The plaintiff originally obtained a sale-deed of the property in dispute for Rs. 900 odd on the 17th of February 1905, but was alleged by defendant to have entered at the same time into an oral agreement for resale, which was alleged to have been reduced sub-

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sequently to writing about June 1905. The allegations as to the resale agreement were held not proved. Earnest money said to have been Rs. 400 was alleged by defendant to have been paid in respect of this agreement of resale on the 24th of April 1908. This allegation also was held not proved. Then plaintiff executed the resale-deed according to his allegation under the coercion of the defendant. The stamp paper for that document was dated the 29th of April 1908, and Rs. 500 balance of purchase-money was alleged to have been paid on execution of the document between the 17th and 21st of September 1908. The plaintiff denied execution as on those dates but he made an application to the Registrar alleging that a false deed had been executed, and would be presented for registration, dated the 29th of October 1908, and he explained that with a view to bringing that false deed to light—whatever he meant by that—he passed two further resale-deeds to his father-in-law for no consideration on the 10th and 17th of November 1908. Then plaintiff received some slight bruises or scratches in the events which have been the main subject of this trial, described by the one side as the forcible execution and on the other as the attempt to steal the resale-deed on the 29th November 1908. Criminal proceedings were instituted on either side but ended eventually in mutual failure and the resale-deed was registered in November 1909. It is not for us to substitute our view of what those circumstances really indicated for the conclusions of those charged with the responsibility of determining the facts but it is clear from a consideration of those circumstances and the observations thereon in the judgments that they were regarded as establishing no more than a suspicion or mere probability that the plaintiff had been deceitfully decoyed into going quietly to the defendant's *mandap* some time on the 29th November 1908, and there privately been made to

sign the document by some kind or other of undefined coercion. Now such a suspicion or mere probability would, in any case, not have been sufficient to support a plea of coercion as pointed out by the Privy Council in the case of *Motee Lall Opudhiya v. Juggurnath Gurg*⁽¹⁾ quite apart from the consideration that it was not *secundum allegata et probata*, namely, that it was not the case set up by the plaintiff nor was it supported by the evidence on which he relied but depended on other circumstances coupled with doubts entertained as to the veracity of the defendant by both the learned Subordinate Judge and the District Judge and coupled with aspersions on the character of defendant relied on contrary to the provisions of section 52, Indian Evidence Act, by the learned District Judge. The rule mentioned by the Privy Council in the case of *Motee Lall Opudhiya v. Juggurnath Gurg*⁽¹⁾ would, in fact, appear to be the basis of the rule that where fraud or coercion are alleged detailed particulars must be given in the pleadings, a rule now expressly laid down in Order VI, Rule 6 of the Schedule to the Civil Procedure Code. When particulars have been given, the parties should be strictly confined to that state of facts as indicated by the Privy Council in the cases of *Eshenchunder Singh v. Shamachurn Bhutto*⁽²⁾ and *Abdul Hossein Zenall Abadi v. Charles Agnew Turner*⁽³⁾. The necessity of strict adherence to these rules and of special care in framing an issue on a plea of fraud—the remarks apply equally to a plea of coercion—was insisted on strongly by Chandavarkar J. in the case of *Balaji v. Gangadhar*⁽⁴⁾. The present case is, in our opinion, a marked instance of the dangers of departing from those wholesome rules. Particulars of the coercion

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(1) (1836) 5 W. R., P. C. 25.

(3) (1887) 11 Bom. 620 at pp. 642-3.

(2) (1866) 11 Moo I. A. 7.

(4) (1908) 32 Bom. 255.

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alleged were here given in the plaint and further elucidated in the plaintiff's deposition and supported by definite witnesses to the effect that there had been open and violent abduction and severe beating to procure signature of the document. These particulars were wholly rejected and the evidence held to be entirely false. Nevertheless a vague and materially different kind of coercion was held to have been probable on other circumstances and doubts as to the veracity and good character of the defendant to the effect that there had been secret seduction and probably some force or threat of violence to procure signature of the document and this was rendered possible by a loose issue as to force and violence framed by the learned Subordinate Judge and a looser issue still as to title to cancellation of the document framed on appeal by the learned District Judge. We are, therefore, of opinion that there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law and that we must, therefore, reverse the decrees of the lower Courts.

With regard to the subsidiary contention raised on this second appeal, namely, that the plaintiff was not entitled to sue as he had transferred the property in suit to his father-in-law and others and therefore had no interest in maintaining the suit, it has been urged in reply that he was in danger by reason of the document in suit, on the one hand, of being sued by the defendant for the purchase-money in case the defendant should be ousted from possession, and, on the other hand, of being sued by his father-in-law or other vendees for damages in case the sale to them should be set aside at the instance of defendant. It appears to us that this reply must be allowed as indicating sufficient interest in the document to support the suit. We are fortified in that decision by a consideration of the

remarks in the case of *Kotrabassappaya v. Chenvirappaya*⁽¹⁾.

We must, however, for the other reasons already stated, dismiss the suit with costs throughout and reverse the decrees of the lower Courts.

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BEAMAN, J.:—I have only come to the same conclusion after the most anxious consideration of all the arguments addressed to us in support of the decree appealed against. No Court has been more jealous, and with rare exceptions, more consistent in the construction it has always put upon section 100 of the Civil Procedure Code, and I should be sorry to think that any decision of mine might be used to let in appeals against what are really decisions upon questions of fact, however gross or inexcusably wrong such decisions might appear in the eyes of this Court. But it certainly does seem to me a strange thing that a plaintiff, who comes into Court alleging fraud or coercion, in respect of which the law, as is well known, requires him to give particulars, should give every particular which must be within his own knowledge, and after being disbelieved upon every material one of them should yet be given relief. It is here that I think this is a very special case and distinguishable from those innumerable cases in which the decision of the Court below is arrived at upon a question of fact and does not fall within the contemplation or the language of section 100, for although in appearance, as Mr. Rao has strenuously contended, the finding of both Courts is a finding of fact, taking this form that the plaintiff was coerced into signing the document which he now seeks to have cancelled, that will be, I believe, found on analysis not to be really a finding of fact which binds or ought to bind this Court, for in all such cases it does

⁽¹⁾ (1898) 23 Bom. 375.

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seem to me that where the fraud or the coercion alleged must by law be supported by particulars, it is only after the due proof and establishment of those particulars that the Courts can find as a fact that the alleged fraud or coercion is proved. I do not think that it is open to a Court to give the go-bye to every material particular alleged, and yet to reach the conclusion which ought only to be reached by those steps. Here, for example, the allegation of the plaintiff is that the coercion was quite open and in view of witnesses. The finding of the Court below is that what coercion there was was done in secret, and that there can be and is no evidence of it. That appears to me then to be a finding absolutely unsupported by any evidence at all. But that again is a sufficient ground for setting aside what might otherwise be a conclusion of fact. It is quite true that the Court has sought to confirm this conclusion by reference to extraneous and surrounding circumstances which my brother Hayward has fully dealt with. I am not now concerned with any criticism of the Court's method there. I desire to found my conclusion on this point that what was essential to be found before there can be any finding of fact binding upon this Court never has been found, namely, the particulars alleged by the plaintiff, and that what was substituted for them, and was absolutely necessary to be substituted for them before any of the surrounding circumstances could be brought in by way of confirmation, is a finding admittedly, I think, not supported by any evidence at all. Therefore, it does appear to me that this is clearly a case in which there has been an error of law notwithstanding the appearance of the finding of the Court below, or, to put it under another head of section 100, there is a substantial error in procedure, inasmuch as the Court has found the case required to be made by the plaintiff not proved, and has found another case unsupported in

its most essential point by any evidence at all, proved, and so substituted the latter for the former. For these reasons I would concur with the judgment and in the order^a just pronounced and proposed by my learned brother.

Decrees reversed and suit dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Hayward.

SITARAM MORAPPA NAWALE (ORIGINAL DEFENDANT), APPELLANT; v. SHRI KHANDOBA AND SHRI YEKVIRA DEVI BY THEIR VAHIVATDAR VISHVANATH DNYANOBA BATHANE (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 3 (w), 10 and 53⁽¹⁾—Suit falling under section 3 (w)—Decision not appealable—Revision by District Judge.

The decision in a suit falling under section 3 (w) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not appealable according to the provisions of section 10 of the Act. Under section 53 of the Act, the District Judge alone and not the Subordinate Judge of the First Class is authorized, in such a case, to pass an order in revision.

APPEAL against the order passed by V. N. Rahrurkar, First Class Subordinate Judge of Satara with appellate powers, remanding the case to the first Court at Karad for trial of issues.

* Appeal No. 10 of 1914 from order.

⁽¹⁾ Sections 3 (w), 10 and 53 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are as follows :—

3. The provisions of this Chapter (that is, Chapter II) shall apply to :—

(w) Suits for the recovery of money alleged to be due to the plaintiff—

On account of money lent or advanced to, or paid for, the defendant, or as the price of goods sold, or

On an account stated between the plaintiff and defendant, or

On a written or unwritten engagement for the payment of money not hereinbefore provided for.

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The plaintiff sued to recover from the defendant Rs. 60, at the rate of Rs. 20 per year, spent by the plaintiff on behalf of the defendant on account of the expenses of an idol.

The defendant denied *inter alia* his liability to contribute to the expense incurred by the plaintiff.

The Subordinate Judge found that the defendant was not liable and dismissed the suit.

The plaintiff having appealed, the appellate Court remanded the case to the first Court for the determination of the question whether the plaintiff had spent money and the expense was necessary?

The defendant appealed against the order of remand.

M. V. Bhat for the appellant (defendant):—This was a suit for contribution by one sharer against another. It fell under clause (w) of section 3 of the Dekkhan Agriculturists' Relief Act, and under section 10 of the Act, the decision of the first Court was not appealable. Therefore the proceedings in appeal before the First

10. No appeal shall lie from any decree or order passed in any suit to which this Chapter (that is, Chapter II) applies.

53. The District Judge may, for the purpose of satisfying himself of the legality or propriety of any decree or order passed by the Subordinate Judge in any suit or other matter under Chapter II, Chapter IV or Chapter VI of this Act, and as to the regularity of the proceedings therein, call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit ;

and any Assistant Judge or Subordinate Judge appointed by the Local Government under section 52 may similarly, in any district for which he is appointed, call for and examine the record of any such suit or matter, and, if he see cause therefor, may refer the same, with his remarks thereon, to the District Judge, and the District Judge may pass such decree or order on the case as he thinks fit :

Provided that no decree or order shall be reversed or altered for any error or defect or otherwise, unless a failure of justice appears to have taken place.

Class Subordinate Judge with appellate powers were *ultra vires* and the remand order passed by him was without jurisdiction.

J. R. Gharpure for the respondent (plaintiff) :—Under section 53 of the Dekkhan Agriculturists' Relief Act the First Class Subordinate Judge with appellate powers had power to revise the proceedings before the Court of trial. The appeal Court was approached by a petition of revision but that Court treated the petition as an appeal. This was simply a mistake of form. The First Class Subordinate Judge had jurisdiction to remand the case for trial of the issue left undetermined.

SCOTT, C. J. :—This was a suit falling under section 3 (w) of the Dekkhan Agriculturists' Relief Act. That being so, according to the provisions of section 10 no appeal lay from the decision of the first Court. The appeal, however, has been entertained and disposed of by Mr. Rahurkar, the First Class Subordinate Judge. We think it is clear, having regard to the terms of section 53, that the First Class Subordinate Judge was not authorised to pass any decree or order in a matter which could be entertained under section 53, and if it were necessary to pass any order in revision, such order should have been passed by the District Judge. The most we can do here is to set aside the decree of the First Class Subordinate Judge and remit the application of the appellant from the decision of the first Court to the District Judge, who may, if he thinks fit, treat it as an application in revision under section 53, and pass such order as he thinks necessary under the circumstances. Costs to be dealt with by the District Judge.

Decree set aside and case remitted.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

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SADHU RAMDAS GOPALDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.*
BALDEVDAJJI KAUSHALYADAJJI (ORIGINAL DEFENDANT 1),
RESPONDENT.*

Hindu Law—Mitakshara, chap. II, sec. 8, para. 2—Claim by plaintiff as Pitrai Chela to recover the property of a deceased Bairagi—Claim not maintainable on the ground of custom and Hindu Law—Bairagis—Sanyasis—Hermit, ascetic, student in theology—Heirs—Preceptor, virtuous pupil and spiritual brother in reverse order.

The plaintiff claiming as Pitrai Chela of a deceased Bairagi sued to recover the property of the deceased.

Held, dismissing the suit, that both on the ground of custom and on the ground of Hindu Law the plaintiff had failed to make out his case.

The declared heir of a Sanyasi under the Mitakshara is a virtuous pupil.

According to the Mitakshara, chap. II, sec. 8, para. 2, the heirs of the property of a hermit, of an ascetic and of a student in theology are the preceptor, the virtuous pupil and the spiritual brother belonging to the same hermitage in the inverse order.

Quære, whether Bairagis can be classed as Sanyasis because the order of Bairagis is not confined to the members of the twice born castes.

FIRST appeal against the decision of H. A. Mohile, Additional First Class Subordinate Judge of Ahmedabad, dismissing the plaintiff's claim in suit No. 815 of 1910.

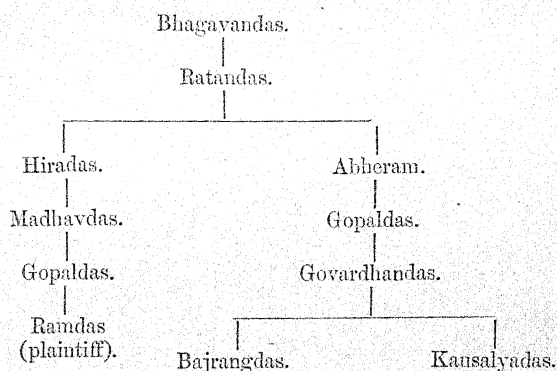
The plaintiff sued to recover possession of the immovable and moveable properties specified in the plaint alleging that a Sadhu (Bairagi) by name Bajrangdas Govardhandas was the owner of the properties, that Bajrangdas lived at Dakore and died on the 1st February 1907 without appointing a Chela (disciple), that Bajrangdas was the Mahant of the temple of Ramji at Dakore, that the temple belonged to an ancestral Guru of the plaintiff,

* First Appeal No. 30 of 1913.

that according to Hindu Law and in accordance with the customary law of Sadhus, the plaintiff was a Pitrai Chela of the deceased Bajrangdas and thus entitled to his property, that the plaintiff called upon defendant 1 under a notice dated the 10th March 1910 to restore the properties in suit to plaintiff but he failed to do so and hence the suit.

Defendant 1 answered *inter alia* that the plaintiff was not the heir of the deceased Bajrangdas Govardhandas, that the plaintiff's grand-guru Govardhandas had two Chelas, namely, Bajrangdas and Kausalyadas, that Kausalyadas became the heir as guru brother of Bajrangdas on his death which occurred on the 1st February 1907, that Kausalyadas had, just before his death, executed a registered will in favour of the defendant and that under the will, which was dated the 21st February 1907, the defendant had become the owner of the property.

The following genealogical tree explains the relationship of the parties :—



The parties were Bairagis belonging to the sect of Ramanandi class.

Defendants 2 and 3 set up their claims as mortgagees of some of the properties in dispute.

The other defendants did not appear.

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The Subordinate Judge found that the plaintiff was not the heir of the deceased Bajrangdas Govardhandas, that Kausalyadas was the Chela of Govardhandas, that the will of Kausalyadas was not genuine and he had no authority to make one in favour of defendant 1 and that the plaintiff was not entitled to any relief. The suit was, therefore, dismissed.

In the course of his judgment the Subordinate Judge observed :—

Plaintiff, defendant No. 1, Bajrangdas and Kausalyadas are not Gosawames. They are not the disciples of any of the 10 Gosawames named at page 434 of the New Edition of Steele on Law and Custom of Hindu castes. They cannot be regarded as Sanyasis, as they are not Brahmins and as women from Patidar caste like witnesses Bai Suraj, Bai Chimani (Exhibits 117, 119) are admitted into their paternity. They are not Vana Prasthas, they are not Naishtik Brahmacharis. We apply the term Yati to Jain or Buddhist mendicants. They cannot therefore be considered as Yatis. They are Bairagis as described on page 103 of Steele on Hindu Law and Custom. In the absence of any other evidence of any custom as to succession among the Bairagis or Bawas or Sadhus to which paternity plaintiff, defendant No. 1 and most of the witnesses belong, the rules of Shankar Muls, *viz.*, the rules applicable to Gosawames and Sanyasis are applicable to Bairagis also (Gharpure's Hindu Law, pages 177, 178) and page 787 of the 2nd Edition of the principles of Hindu Law by Mr. Ghose.

The principles that we deduce from a number of decided cases and standard works are these :—No Chela has a right to succeed to the property of a deceased Guru. His right of succession depends upon his nomination by the deceased Guru in his lifetime which nomination is generally confirmed by the Mahants of the neighbourhood when they assemble together to perform the Bhandara or the funeral obsequies of the deceased Guru. When a Guru does not nominate his successor from among his Chelas, such a successor is elected and installed by Mahants and principal persons of the section (I. L. R. 1 All. pp. 539, 540 ; 29 All. p. 109 ; 14 Cal. W. N. p. 210 ; and I. L. R. 11 Bom. p. 514). Succession is certainly regulated by the special custom of the foundation, 9 All. p. 116. * * Though a precedent quoted at page 572 of the 2nd Edition of West and Buhler's Hindu Law shows that one of the sect of the Bairagis will be his heir and though a Guru Bhai was regarded as an heir, and a Guru's Guru was considered to be an heir (pages 574, 575 of West and Buhler's Hindu Law), still we do not find any instance in which agnatic

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succession of Chelas, as for the pedigree given in the 4th para. of the plaint, was even recognized at any time by any Court of Justice among Gosawames, Sanyasis and Sadhus and Bairagis. There may have been sprung up a regular genealogy among Sanyasis as in the case of ordinary individuals. The idea is however a creation of the fancy of the ignorant in these latter days and is not based on the Smritis (page 775 of the 2nd Edition of Mr. Ghose's Hindu Law). The principles already given clearly indicate that plaintiff has no right to succeed to the properties in suit as heir to the deceased Bajrangdas. * *

* * * Conceding for the sake of argument that the temple in suit was a dependent Mahant, still the principle of succession is based upon fellowship and personal association and a stranger, though of the same order, is excluded (I. L. R. 4 Cal. p. 543). Plaintiff cannot therefore be regarded as heir to the deceased Bajrangdas. The temple at Dakore would be guided by its own rules of management (14 Cal. W. N. p. 211).

Plaintiff and defendant 1 admittedly belong to a sect of Vaishnavas of the Ramanandi class, Ramanuj belonged to the same class. The principles of succession already indicated and those laid down in *Mohunt Ramji Dass v. Lachaman Dass*, 7 Cal. W. N. 145, apply to plaintiff's case. These principles, it must be repeated, do not show that plaintiff is the heir of the deceased Bajrangdas.

* * * * *

These Sadhus think that they have a right to dispose of the properties of the temples of which they are the Mahants. They are engaged in worldly pursuits. Most of them only know how to make their signatures in Devnagari which they call Sudha language and speak a dialect which is a mixture of Hindi and Gujrathi. They have no control over their passions, and they cannot be called Gosawames, i.e., those who are the Swamis or Masters of "Go" or passions. They do not seem to have cut off all their love for worldly things and they cannot consequently be called Vairagis or those who have given up their "Rag" or love for worldly things. They do not strive for absolution or annihilation and they cannot therefore be called "Yatis". They have not shaken off the trammels of the 6 enemies काम, क्रोध etc., and they cannot be called Shuda Dhus or Sadhus. They do not in short answer the root meanings of Gosawames, Bairagis, Yatis and Sadhus. Though Shastras are admitted into the paternity of Sanyasis, they cannot be called Sanyasis, as they live permanently in towns like Dakore and Nadiad. Though the term Yati is applied to Bairagis (28 Cal. p. 608), they are not Bairagis in the strict sense of the word. They are not assiduous in the study of theology, in retaining the holy science and in practising its ordinances. They do not seem to know anything about the tenets of Ramanand or Ramanuj, Nimbadijs, Kabir or

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Dado (*vide* page 572 of the 2nd Edition of West and Buhler's Hindu Law). They cannot therefore be regarded as "virtuous" pupils of their Gurus.

The plaintiff appealed.

I. N. Mehta with *N. N. Mehta* for the appellant (plaintiff):—The parties are Bairagis, Bawas or Sadhus. The special rule of succession applicable to such people is laid down in Yajnavalkya Smriti, chap. IV, sec. 8, verse 137. We take our stand on this text of the Mitakshara and not quite so much on custom: *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*⁽¹⁾.

Bajrangdas died without a Chela (disciple), and in the absence of any Chela, the plaintiff, who belongs to the same sect or order founded by Bhagvandas, has the right to succeed as the heir of Bhagvandas. It is laid down in the Mitakshara: "But on failure of these, namely, the preceptor and the rest, any one associated in holiness (*ekatirthi*) takes the goods, even though sons and other natural heirs exist." Colebrookes' Mitakshara, p. 355, para. 6.

Bhagvandas was the original founder of the order and it was he who sent Abheram to take care of the Dakore temple. We submit, therefore, that in the absence of any special custom, which we have not alleged, the said text of the Mitakshara should apply and the plaintiff has the right to succeed as *ekatirthi*.

Setlur with *N. K. Mehta* for the respondent (defendant):—The passage in the Mitakshara which is relied on deals with the inheritance of Sanyasis and it is not applicable. Chapter IV, sec. 8, verse 137, of the Mitakshara distinctly deals with hermits, ascetics or Sanyasis and Naishthik Bramhacharins. These orders are not open to those who are not twice born. The

⁽¹⁾ (1887) 10 Mad. 375.

Sanyasis spoken of here are the twice born : Mitakshara, Prayashchitta, Book III, chap. IV, cl. 201.

The parties to the suit are Bairagis who admit in their order men of all castes and even females. They are governed by customary law : West and Bühler, pp. 552 *et seq.* In the absence of any special custom, the general custom which has been recognized by the law Courts must govern the case. The inheritance goes to the nominee of the deceased Guru. In the absence of such nomination it goes to the one elected by the Mahants connected with the Math : West and Bühler, p. 554, and cases cited in the footnote (b).

SCOTT, C. J. :—The plaintiff sued to recover possession from the 1st defendant of certain temple properties at Dakore, claiming to be the Pitrai Chela of the deceased Bajrangdas who was a Mahant of the Dakore temple. The first defendant disputed his claim and called upon the plaintiff to prove the claim he asserted. The parties, it is not disputed, are Bairagis belonging to the sect of Vaishnavas of the Ramanandi class. It has been laid down in *Ram Dass Byragee v. Gunga Dass*⁽¹⁾, that in that class of Bairagis on the demise of the superior Math, when there is no Chela to succeed, the heads of the Maths ordinarily elect a successor from pupils of some other teacher (compare replies 39 and 40 relating to Bairagis in Borradaile's Caste Customs in Gujarat). That has not been done in the present case, nor has the plaintiff proved the existence of any special custom relating to the Dakore Math. It is contended on his behalf that Bajrangdas under whom he claims was a Sanyasi, and that he is entitled by virtue of a certain passage in the Mitakshara, chap. II, sec. 8, para. 2, to succeed to the property of that Sanyasi. The passage is as follows :—"The heirs to the property of a hermit,

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of an ascetic, and of a student in theology, are, in order (that is, in the inverse order), the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage," and the three following paragraphs make it clear that the expression "in the inverse order" means that the heir of a student in theology is a preceptor, the heir of an ascetic is a virtuous pupil, and the heir of an hermit is a spiritual brother belonging to the same hermitage. But as I understand the argument which has been addressed to us on behalf of the appellant, it is contended that the plaintiff is a spiritual brother of the deceased Bajrangdas, but the deceased Bajrangdas was not a hermit, and therefore, that class of heirs cannot be resorted to in the present case. Putting the position of Bajrangdas at its highest he was a Sanyasi, and, therefore, the declared heir of the Sanyasi under the Mitakshara would be a virtuous pupil. But the plaintiff was not a pupil of Bajrangdas, therefore he does not take as his heir according to the Mitakshara. It is, however, extremely doubtful whether the Bairagis can be classed as Sanyasis, because the order of Bairagis is not confined to the members of the twice born castes. As to this, reference may be made to Mitakshara Prayashchita, Book III, chap. IV, cl. 201, of the Allahabad translation. It appears to us, therefore, that both on the ground of custom and on the ground of Hindu Law the plaintiff has failed to make out his case. We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G B. R

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

SATWAJI BALAJIRAV DESHAMUKH (ORIGINAL PLAINTIFF), APPELLANT, 1914.
 v. SAKHARLAL ATMARAMSHET (ORIGINAL DEFENDANT 7), September 8
 RESPONDENT.*

Decree for possession on payment of a certain sum within six months, in default, forfeiture of the right to recover possession—Appeal—Confirmation of decree—The term of six months to run from the date of the final decree.

The plaintiff brought a suit to recover possession of property as purchaser from defendants 1—6 and to redeem the mortgage of defendant 7. The first Court having dismissed the suit, the appellate Court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum within six months from the date of its decree and then to redeem defendant 7, and on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections. The High Court confirmed the decree and the plaintiff's second appeal and the defendants' cross objections were dismissed.

Within six months of the date of the High Court's decree the plaintiff deposited in Court the amount payable by him and applied for execution. Defendant 7 contended that the plaintiff not having complied with the terms of the decree of the first appellate Court, his right to recover possession in execution was forfeited. The lower Courts upheld the defendant's contention and dismissed the application.

On second appeal by the plaintiff,

Held, reversing the decree, that the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of the lower Court, for what was to be looked at and interpreted was the decree of the final appellate Court.

Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh⁽¹⁾ and *Nanchand v. Vithu*⁽²⁾, followed.

SECOND appeal against the decision of G. R. Datar, Additional Assistant Judge of Thana, confirming the

* Second Appeal No. 169 of 1914.

⁽¹⁾ (1900) L. R. 27 I. A. 209.

⁽²⁾ (1894) 19 Bom. 258.

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order of K. V. Mehta, Subordinate Judge of Murbad, in an execution proceeding.

The plaintiff brought a suit against defendants 1—6 to recover possession of the property as purchaser and for redemption against defendant 7 to whom his vendors had already mortgaged the property. The defendants contested the plaintiff's title. The Subordinate Judge found that the plaintiff's title was not proved and the suit was dismissed.

On appeal by the plaintiff the District Judge found that the plaintiff's sale-deed gave him a title to the lands in suit. He, therefore, set aside the decree of the Subordinate Judge and passed his own in the following terms on the 23rd December 1910 :—

I set aside the lower Court's order dismissing the suit and direct that on plaintiff-appellant paying defendants 1—6 the sum of Rs. 203-1-8 and paying all costs his own and defendants 1—7 in the suit, within six months from today, he shall be put in possession of the property and shall then pay defendant 7 the sum of Rs. 997-8-0 now found to be due on the mortgages with future interest at 6 per cent. per annum from the date of recovering possession to the date of payment on Rs. 633 (.....) by annual instalments of Rs. 150 payable in February of each year beginning with February 1912. If there is a failure to pay any instalment when due defendant 7 may apply to the Court for an order under section 15B (2), Dekkhan Agriculturists' Relief Act. If plaintiff fails to pay the sum due to defendants 1—6 and costs within six months from today he shall forfeit his right to recover possession of the land.

Against the said decree the plaintiff preferred a second appeal, No. 284 of 1911, and defendants 1—6 and defendant 7 filed separate sets of cross objections. In the said second appeal and cross objections the High Court merely confirmed the decree of the District Court on the 26th February 1912.

Subsequently the plaintiff paid the money into Court and filed a darkhast, No. 212 of 1912, for the execution of the decree. Defendant 7 contended that the plaintiff

had forfeited his right to recover possession as he failed to comply with the decree of the District Court directing payment within six months from the date of that decree. The Subordinate Judge dismissed the darkhast observing :—

The plaintiff should have deposited the amount within the time fixed in the decree of the District Court or applied to the High Court to extend the time fixed in the District Court's decree. The decree of the High Court confirming the decree of the District Court cannot be interpreted to extend the time fixed in the decree of the District Court, *Ramaswami v. Sundara*, I. L. R. 31 Mad. 28.

On appeal by the plaintiff the appellate Judge confirmed the order.

The plaintiff preferred a second appeal.

P. D. Bhide for the appellant (plaintiff) :—We submit that the period of six months for the payment of the amount should be counted from the date of the High Court's decree in the second appeal wherein the decree of the District Court of Thana was confirmed. The decree of the Thana District Court in appeal became merged in the High Court's decree in the second appeal and the High Court's decree was the only decree in the case that could be executed. We paid the amount into Court within six months of the High Court's decree. The lower Court was, therefore, wrong in refusing to put us in possession. On this point the rulings of this Court are all one way and lay down that it is the decree of the High Court, that is, the last decree in the case which should be considered in such cases.

Further, the decree of the Thana District Court was in the nature of a decree *nisi* and so was not capable of execution till it was made absolute.

T. R. Desai for the respondent (defendant 7) :—The decree of the Thana District Court in appeal was not a decree *nisi*. It imposed a condition on the plaintiff,

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first to pay the balance of the purchase-money to defendants 1—6 within six months and then, having done so, he was to redeem defendant 7. The Bombay cases do not touch the point. The decree of the High Court confirming the decree of the Thana District Court could not *per se* extend the period of six months given in the latter decree. We rely upon the decision of the Madras High Court in *Ramaswami Kone v. Sundara Kone*⁽¹⁾. There the lower Court had fixed a period of one month for payment. The period expired and there was an appeal and the decree was subsequently confirmed. But the right to pay was held lost because the period of one month from the date of the original decree had expired. To hold otherwise would be to enable a dishonest party to secure extension of time by merely managing to file an appeal. The same principle is applied in pre-emption decrees by the Allahabad High Court in *Jaggar Nath Pande v. Jokhu Tewari*⁽²⁾ and *Chiranji Lal v. Dharam Singh*⁽³⁾. The Calcutta High Court has taken the same view in *Bhola Nath Bhattacharjee v. Kanti Chundra Bhattacharjee*⁽⁴⁾. If at all, the only remedy of the plaintiff would have been to apply, if so advised, to the High Court for review in the second appeal and ask for extension of time. But he cannot ask the executing Court to extend the time at this stage. Section 148 of the Civil Procedure Code of 1908 is not applicable: *Suranjan Singh v. Ram Bahal Lal*⁽⁵⁾.

SCOTT, C. J. :—The suit in relation to which the execution proceedings now in question have been taken was brought by the plaintiff against the first six defendants as vendors who denied his title as purchaser and against the seventh defendant as mortgagee from the

⁽¹⁾ (1907) 31 Mad. 28.

⁽³⁾ (1896) 18 All. 455.

⁽²⁾ (1895) 18 All. 223.

⁽⁴⁾ (1897) 25 Cal. 311.

⁽⁵⁾ (1912) 10 A. L. J. 520.

other defendants to enforce his purchase against the vendors and to redeem the mortgage.

The original Court dismissed the suit holding that the plaintiff's title as purchaser was not established as he had not paid the full purchase-money and was not ready and willing to perform his contract. The first appeal Court, however, reversed the decree of the original Court and passed a decree that on plaintiff paying defendants 1 to 6 the sum of Rs. 203-1-8 and paying all costs in the suit within six months from the date of the decree he should be put in possession of the property and should then pay defendant 7 the sum of Rs. 997-8-0 found due on the mortgage with further interest from the date of recovering possession to date of payment on Rs. 633 by annual instalments of Rs. 150 payable in February of each year beginning with February 1912 and that if the plaintiff failed to pay the sum due to the defendants 1 to 6 and costs within six months from the date of the decree he should forfeit his right to recover possession of the land.

None of the parties were satisfied by this decree. The plaintiff within ninety days filed an appeal to the High Court and the two sets of defendants filed separate sets of cross-objections. The decree was, however, confirmed by the High Court and the appeal and cross-objections were dismissed.

Within six months from the date of the High Court decree the plaintiff deposited in Court the amount payable by him. The defendant 7 then put in an objection that the plaintiff not having complied with the terms of the decree of the first appellate Court his right to recover possession in execution was forfeited.

Both the lower Courts have upheld this objection on the authority of *Ramaswami Kone v. Sundara Kone*⁽¹⁾.

⁽¹⁾ (1907) 31 Mad. 28.

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There is, however, the direct authority of this Court to the contrary : see *Nanchand v. Vithu*⁽¹⁾. It was there said : "Both parties must be held equally bound or equally benefited by the result of this second appeal, and if the original respondents would have become entitled to execute the decree of the High Court in case it had reversed the decision of the lower Courts, we do not see any reason which prevents the present appellant from claiming his right to execute the decree of the High Court in his favour." These observations, which were based upon a similar state of facts, are applicable to the present case and the lower Courts should have followed that decision. It was in accordance with a decision reported in *Sakhalchand Rikhawdas v. Velchand Gujar*⁽²⁾.

The decision of the Madras High Court followed by the lower Courts refers to the judgment of Sir John Edge in *Jaggar Nath Pande v. Jokhu Tewari*⁽³⁾, which was based upon the express provisions of section 214 of the Civil Procedure Code applicable in decrees in pre-emption suits, but we do not understand that judgment as throwing any doubt on the Full Bench decision in *Muhammad Sulaiman Khan v. Muhammad Yar Khan*⁽⁴⁾, delivered by the same learned Chief Justice and applied in *Sakhalchand Rikhawdas v. Velchand Gujar*⁽²⁾ and *Nanchand v. Vithu*⁽¹⁾ or the Full Bench decision of the Allahabad High Court, *Shohrat Singh v. Bridgman*⁽⁵⁾, explained and adopted in *Muhammad Sulaiman Khan v. Muhammad Yar Khan*⁽⁴⁾. The observations of Banerjee J. in *Bhola Nath Bhuttacharjee v. Kanti Chundra Bhuttacharjee*⁽⁶⁾, referred to in *Ramaswami Kone v. Sundara Kone*⁽⁷⁾ and relied on

⁽¹⁾ (1894) 19 Bom. 258.

⁽⁴⁾ (1888) 11 All. 267.

⁽²⁾ (1893) 18 Bom. 203.

⁽⁵⁾ (1882) 4 All. 376.

⁽³⁾ (1896) 18 All. 223.

⁽⁶⁾ (1897) 25 Cal. 311.

⁽⁷⁾ (1907) 31 Mad. 28.

by the respondent's pleader before us, were in a case where the decree of the lower Court had been dismissed and not confirmed; and Banerji J. may have had in mind the possible distinction between dismissal and confirmation indicated by Jenkins C. J. in *Kailash Chandra Bose v. Girija Sundari Debi*⁽¹⁾. Of the other cases cited for the respondent, *Patloji v. Ganu*⁽²⁾ was a case where there was no decision on final appeal but only a dismissal for non-prosecution in the final appeal and similar, therefore, to the decision of the Judicial Committee in *Abdul Majid v. Jawahir Lal*⁽³⁾ in which it was held that the time for executing a decree *nisi* for sale of mortgaged property ran from the date of the High Court decree confirming the decree of the first Court. *Aminabi v. Sidu*⁽⁴⁾ was a case where the decree had been legally executed before the appeal and the defendant never applied for a stay of execution or tendered the money payable by him till after the dismissal of the appeal. We also think that the decision in *Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*⁽⁵⁾ is an authority in the appellant's favour. What has to be looked at and interpreted is the decree of the final appellate Court, in this case the High Court.

We reverse the decree of the lower Court, set aside the defendant's objection and remand the plaintiff's application in execution for disposal according to law.

Defendant 7 to pay the costs of the objection throughout.

Decree reversed and case remanded.

G. B. R.

(1) (1912) 39 Cal. 925 at p. 929.

(3) (1914) 36 All. 350.

(2) (1890) 15 Bom. 370.

(4) (1892) 17 Bom. 547.

(5) (1900) L. R. 27 I. A. 209.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

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October 7.

MISS BLANCHE SOMERSET TAYLOR (ORIGINAL PETITIONER), APPELLANT,
v. CHARLES GEORGE BLEACH (ORIGINAL OPPONENT), RESPONDENT,
AND CHARLES GEORGE BLEACH (ORIGINAL OPPONENT), APPELLANT,
v. MISS BLANCHE SOMERSET TAYLOR (ORIGINAL PETITIONER),
RESPONDENT.*

*Indian Divorce Act (IV of 1869), section 37—Decree for divorce—
Permanent maintenance—Award of a lump sum—Payment.*

In a suit for divorce brought by the wife, the District Judge has, under section 37 of the Indian Divorce Act (IV of 1869), power to make the order for payment of a lump sum for the permanent maintenance of the wife.

Per Hayward, J. :—The plain meaning of the words of section 37 of the Indian Divorce Act (IV of 1869) is that the gross sum of the money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life.

CROSS appeals against the decision of C. A. Kincaid, District Judge of Poona, in suit No. 116 of 1914.

The petitioner, Miss Blanche Somerset Taylor, had applied to the High Court for a judicial separation from her husband. This was granted to her on the 20th September 1904 and the Court awarded her alimony at the rate of Rs. 150 a month. This allowance the petitioner recovered from her husband until 1913 when she applied to the District Court at Poona for a divorce. The Court passed a decree *nisi* for divorce in suit No. 50 of 1913 on the 17th December 1913 and the High Court confirmed the decree on the 26th June 1914. Subsequently on the 11th July 1914 the petitioner presented an application, No. 116 of 1914, to the District Court praying that the opponent may be directed to pay her Rs. 50,000 in lump under section 37 of the Indian Divorce Act. The Court awarded her a lump sum of Rs. 5,000 with 6 per cent. interest from the date of the decree till payment and an injunction restraining the opponent

* Cross Appeals Nos. 200 and 201 of 1914.

from disposing of his property till he had satisfied the petitioner's claim with costs. The interest was directed to be recoverable monthly.

The petitioner and the opponent being dissatisfied with the said order, they preferred cross appeals Nos. 200 and 201 of 1914 respectively.

G. S. Rao for the appellant (opponent) in appeal No. 201 of 1914:—We submit that the District Judge had no jurisdiction to award a lump sum to the petitioner with a direction that it be paid over to her, and secondly, that in any event, the amount awarded is excessive. Section 37 of the Indian Divorce Act authorizes a Judge to secure a sum to the wife. "Secure" cannot mean "pay over". The object of the statute is to secure maintenance to the wife during her life-time. The Indian statute follows the English law. In *Medley v. Medley*⁽¹⁾ it was doubted if "secure" included "payment". In a recent case, *Twentyman v. Twentyman*⁽²⁾, it was definitely ruled that Court has no authority to award lump sum. The words "any term not exceeding her life" qualify the whole clause and having regard to the frame and scheme of the section the construction accepted in *Twentyman v. Twentyman*⁽²⁾ should be followed.

We further submit that on the evidence the award of Rs. 5,000 is very excessive. Originally the petitioner was awarded Rs. 125 per month and even that amount being excessive we were going to have it reduced.

Binning with *T. R. Desai* and *P. Bunter* for the respondent (petitioner) in appeal No. 201 of 1914:—The order of the Judge is correct. So far as his power to award a lump sum is concerned, the conditions in England differ from those in India. The wife may leave India and cannot be expected to return here

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(1) (1882) 7 P. D. 122.

(2) [1903] P. 82.

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every time to receive her allowance. Hence the statute empowers the Court to grant to the wife a lump sum. Now as to "securing" we contend that there could be no better method than "paying over". Even in England it was understood that the Court had such power. No doubt the recent ruling in *Twentyman v. Twentyman*⁽¹⁾ is against us. But the English and Indian statutes differ. In the authorized copy of the Indian statute there is a comma after the words "gross sum", and so the words "for any term not exceeding her life" cannot qualify "gross sum". The recitals of reasons in the two statutes also differ.

In our appeal (No. 200) we submit that the amount awarded to us is too little. Originally we were given Rs. 150 per month, that is, Rs. 1,800 per year. Rs. 5,000 if invested, will not fetch even Rs. 200 a year, that is, not even of Rs. 16 per month. The opponent has fair means and we should be awarded, on the principle of English cases, a gross sum which would yield at least Rs. 100 per month.

SCOTT, C. J.:—These are cross appeals from an order of the District Judge of Poona awarding a lump sum of Rs. 5,000 to be paid to the petitioner for permanent maintenance under section 37 of the Indian Divorce Act IV of 1869. The petitioner appeals on the ground that the sum awarded is not sufficient and that the Court should have secured to her a sum the interest of which would secure her at least Rs. 150 per mensem. The respondent appeals on the ground that the Court has no power to award payment of a lump sum and that if it had the power the sum awarded is excessive.

First, as to the power of the Court to award payment of a lump sum.

⁽¹⁾ [1903] P. 82.

The material clause of section 37 of the Divorce Act is the third. It gives the Court power to "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard" etc.

As the sentence is punctuated in the state publications of the Act it seems to me to be clear that the words "for any term not exceeding her own life" qualify "annual sum" and do not qualify "gross sum". If so assuming a gross sum to be available, how can it be better secured to the wife than by paying it over to her?

The argument against this view was based upon the judgments in *Medley v. Medley*⁽¹⁾ and *Twentyman v. Twentyman*⁽²⁾.

I can see no reason why the punctuation of the editions of the Act issued by the Government of India should be disregarded for so far as I am aware there is not in India any unpunctuated original Statute Book. The position is not the same as in England where in *Stephenson v. Taylor*⁽³⁾, Cockburn C. J. said: "On the parliament roll there is no punctuation, and we therefore are not bound by that in the printed copies." In *Barrow v. Wadkin*⁽⁴⁾, Sir John Romilly M. R. said: "I supposed I should not learn much on the subject from the inspection of the Roll of Parliament, but, as it was in my custody, I have examined it. . . . It seems that in the Rolls of Parliament the words are never punctuated, and accordingly very little is to be learnt from this document."

The punctuation of the Queen's Printers' edition of 20 & 21 Vict. c. 85, section 32, published in 1857, is the same as the Indian punctuation and it appears

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that in three reported cases covering a period from 1870 to 1902 (*viz.*, *Morris v. Morris*⁽¹⁾, *Stanley v. Stanley*⁽²⁾, *Kirk v. Kirk*⁽³⁾) the Divorce Court in England has taken the words now under consideration as authorizing it to award payment of a lump sum to the petitioner's wife. *

In *Medley v. Medley*⁽⁴⁾ the appeal Court in England expressed a contrary opinion being influenced partly by the recital in the amending Act 29 and 30 Vict. c. 32 and in *Twentyman v. Twentyman*⁽⁵⁾ Jeune J. held that the Court had no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance. That conclusion was possible though by no means inevitable on an unpunctuated Act, but I do not think it would be a reasonable conclusion on the clause of the Divorce Act of 1869 punctuated as it is in the Government of India edition.

In India we have no Amending Act with an explanatory recital such as was before the Court in *Medley v. Medley*⁽⁴⁾. Section 37 incorporates without comment the operative parts of the two English Acts and cannot be construed with reference to a recital which has been omitted.

In my opinion, therefore, the District Judge had power to make the order for payment of a lump sum.

On the second question whether the sum awarded was adequate or excessive it appears to me that on the evidence it was a reasonable award and I do not think this Court would be justified in interfering with it.

I would dismiss both appeals without costs.

HAYWARD, J.:—I quite agree that we should not be justified on the scanty materials before us in interfering

(1) (1861) 31 L. J. P. & M. 33.

(3) [1902] P. 145.

(2) [1898] P. 227.

(4) (1882) 7 P. D. 122 at p. 124.

(5) [1903] P. 82.

with the amount, namely Rs. 5,000, awarded for permanent maintenance by the District Judge.

But the question whether that amount should be paid absolutely or should be secured for a limited term by an appropriate instrument would appear to me a more difficult matter. We have been referred to a number of conflicting decisions of the English Courts upon the corresponding provisions of the English statutes, namely section 32 of 20 & 21 Vict. c. 85 (1857) and section 1 of 29 & 30 Vict. c. 32 (1866) which have been combined into section 37 of the Indian Divorce Act, 1869. The Judge Ordinary Sir C. Cresswell ordered the absolute payment of a gross sum in the case of *Morris v. Morris*⁽¹⁾ and Gorell Barnes J. followed this order in the subsequent cases of *Stanley v. Stanley*⁽²⁾ and *Kirk v. Kirk*⁽³⁾. But in the mean while Jessel M. R. had held in the case of *Medley v. Medley*⁽⁴⁾ that the absolute payment of a gross sum could not be ordered, because payment from time to time was contemplated by the word "secure" used in the statute of 1857. It was again more recently held by Jeune J. in the case of *Twentyman v. Twentyman*⁽⁵⁾ that the word "secure" was governed by the phrase occurring later on "for any term not exceeding life". Lindley L. J. concurred with the Master of the Rolls in the former case but observed that the word "secure" would ordinarily include "pay". The learned Judges appear to have been moved to their decision by the consideration that the word "secure" coupled with the provision for the execution of a proper instrument in the statute of 1857 applied only to cases where there might be property which could properly be secured by such instrument, as recited in the preamble of the subsequent statute making provision for cases

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(1) (1861) 31 L. J. P. & M. 33.

(3) [1902] P. 145.

(2) [1898] P. 227.

(4) (1882) 7 P. D. 122 at p. 124.

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where there might be no such property namely the statute of 1866. We should no doubt feel ourselves bound to follow that decision had the provisions of the English statutes been incorporated in their entirety in the Indian Divorce Act, 1869. But the distinction between cases of property and cases of no property has, intentionally or unintentionally, not been retained owing to the omission of the preamble of the statute of 1866. So that the opening words 'In every such case' which would otherwise have referred to cases of no property cannot gramatically be so read in section 37 of the Indian Divorce Act, 1869.

We ought, therefore, in my opinion to approach the matter as *res integra* from the starting point of Lindley L. J. that the word "secure" would ordinarily include "pay" and consider whether that ordinary meaning should be modified by reason of the other words used in the section. The material words are that the Court may order the husband to "secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as . . . it thinks reasonable . . . and for that purpose may cause a proper instrument to be executed". The plain meaning of those words would appear to me to be that the gross sum of money should be paid absolutely to the wife and that the annual sum of money only should be limited for the period of her life. It was the use of the word "annual" which required the limitation "for the period of her life". The words would have been "such gross or annual sum of money for any term not exceeding her own life", if it had been intended to limit the use of the gross sum as well as the annual sums for the period of her life. It was moreover apparently foreseen that the gross sum might be paid down at once in which case there would be no necessity for the execution of any

document and hence among other reasons no doubt it was provided that the parties "may" and not "shall" be ordered to execute a proper document. The succeeding clause opening with the words "In every such case" must, as already indicated, be construed as adding power to order the payment of monthly or weekly sums in all cases and not merely in cases of no property owing to the special form of drafting of section 37 of the Indian Divorce Act, 1869.

These conclusions have been reached without reference to the punctuation, but if regard may be had to punctuation, then they are confirmed by the punctuation of the section as appearing in the publication of the Act at page 375 of the Gazette of India dated 6th March 1869. The generally accepted rule was that punctuation could not be regarded in interpreting Acts of Parliament and this rule was founded on reason as no punctuation appeared in the Acts on the Rolls of Parliament. But since 1849 punctuation has been inserted. Nevertheless the old rule would appear to survive in England (Maxwell's Interpretation of Statutes, 5th Ed., chap. I, sec. V, pp. 67 and 68). Lord Esher M. R. observed that there were no such things as stops and brackets in an Act of Parliament and Lord Fry refused where the sense was strong to "pause at those miserable brackets", though refraining from expressing an opinion whether brackets could be looked at in an Act of Parliament in the case of *Duke of Devonshire v. O'Connor*⁽¹⁾. It should be no matter of surprise therefore that the old rule should be applied to the old Regulations promulgated in this country and it will be found that the Privy Council remarked upon a consideration of an old Bengal Regulation of 1819 that it was an error to rely on punctuation in construing the

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⁽¹⁾ (1890) 24 Q. B. D. 468.

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Acts of the Legislature in the case of *The Maharani of Burdwan v. Krishna Kamini Dasi*⁽¹⁾. But whatever may have been the practice under the old Regulations, the practice would appear since the constitution of regular Legislatures in India to have been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts signed by the Governor-General and published in the Gazette of India and Maclean C. J. ventured to look at the stops in such an Act in the case of *The Secretary of State for India in Council v. Rajlucki Debi*⁽²⁾ and so did Parsons Ag. C. J. in the case of *A (Wife) v. B (Husband)*⁽³⁾, though the action of the latter was reprehended by the Full Bench of the Allahabad High Court in the case of *Edward Caston v. L. H. Caston*⁽⁴⁾ relying on the remarks of the Privy Council. With due deference to that Bench there would, however, appear to me no sufficient ground, in view of the fact that it was an old Regulation under the consideration of the Privy Council and in view of the deliberate insertion of stops by the regular Legislatures, for refusing the assistance of the punctuation where the sense might otherwise be doubtful in Acts of the regularly constituted Legislatures of India.

Appeals dismissed.

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⁽¹⁾ (1887) 14 Cal. 365 at p. 372.

⁽³⁾ (1898) 23 Bom. 460.

⁽²⁾ (1897) 25 Cal. 239 at p. 242.

⁽⁴⁾ (1899) 22 All. 270 at pp. 276, 277.

ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*HIRJI KHETSEY & COMPANY, PLAINTIFFS, v. THE BOMBAY BARODA
AND CENTRAL INDIA RAILWAY COMPANY, DEFENDANTS.*

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Indian Contract Act (IX of 1872), sections 151 and 152—Liability of Railway Companies for loss, damage or destruction of goods entrusted to them for carriage—Evidence necessary to exonerate Railway Company when the true cause of the loss, etc., cannot be ascertained—Provision of appliances to put out fires.

H. sued the B. B. & C. I. Railway Company for the value of certain bales of cotton entrusted to the railway company for carriage and accidentally burnt while being so carried.

Held, that the railway company, merely by getting the Court to believe that the wagon on which the goods entrusted to it had been loaded had been so loaded with ordinary care, had not done all that was needed to absolve itself, but that in the absence of a definite known cause, the railway company had to satisfy the Court that in the management of its engines, and in the whole course of drawing the wagon to the place where it caught fire, the railway company observed in all respects the same degree of care and prudence which an ordinary man conveying his own valuable goods might have been expected to take under the same circumstances.

When anyone has entrusted goods to a railway company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the railway company, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Indian Contract Act but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus.

Lakhichand Ramchand v. G. I. P. Railway Company⁽¹⁾ is an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of the loss. The company as bailee is primarily liable for the loss, but it may exonerate itself in

* O. C. J. Suit No. 963 of 1912.

⁽¹⁾ (1911) 37 Bom. 1.

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two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the railway company's control. Second, the bailee, while ignorant of the *vera causa*, might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. But such a defence could only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

THE plaintiffs in this suit were a firm of cotton merchants carrying on business at Bombay and having a branch office at Ujjain. On the 15th of April 1912, the plaintiffs' branch at Ujjain entrusted to the defendants at their station at Ujjain 2 lots of cotton of 135 and 100 bales respectively to be delivered to the plaintiffs in Bombay, and the defendants gave receipts in respect of each of these lots. The plaintiffs presented these receipts at Bombay to the defendants and paid the freight payable in respect of the lots, but the defendants failed to give delivery of 122 bales out of the lot of 135 bales and of 51 bales out of the lot of 100 bales. In fact the bales of which delivery was not given had been destroyed by fire while in the custody of the defendants, the circumstances of such destruction being fully set out in the judgment of the learned Judge.

The plaintiffs on failing to receive the balance of the bales above mentioned sued the defendants to recover the value thereof. In their written statement the defendants stated that the bales had been destroyed while in transit on the defendants' railway, that the defendants had been unable to discover the cause of the fire, but that the fire and the destruction of the bales had not been due to the negligence of the defendants or their servants or to any cause for which the defendants were responsible and claimed that in their carriage

and custody of the bales the defendants had acted throughout with all the care and taken all the precautions incumbent on them as bailees.

Inverarity, with *Raikes* and *Captain*, for the plaintiffs.

Contentends that the railway has got to show what the cause of the fire was.

Relies on *Hurlstone v. London Electric Railway Company*⁽¹⁾.

Deals with the method of loading the bales: alleges improper management of the engine.

Refers to *Piggot v. The Eastern Counties Railway Company*⁽²⁾; *Fremantle v. The London & N. Western Railway Co.*⁽³⁾.

Contentends that there is no evidence as to rules being given to the driver.

Relies on *Gibson v. The South-Eastern Railway Company*⁽⁴⁾; *The Rivers Steam Navigation Company v. Choutmull Doogar*⁽⁵⁾.

Binning, with him *Strangman* (Advocate General) and *Jardine*, for the defendants.

BEAMAN, J.:—The material facts about which there is little, if any, dispute are that the defendant-company received from the plaintiffs 186 bales of full pressed cotton for conveyance from Ujjain to Colaba. The goods were to be carried at railway risk. They appear to have been loaded on a bogie open truck forty-five feet long by nine feet wide, inside measurements, between the 14th and 16th April at Ujjain. During that time, though there is no specific evidence on the point, it may be taken

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⁽¹⁾ (1913) 29 T. L. R. 514.

⁽³⁾ (1861) 10 C. B. (N. S.) 89.

⁽²⁾ (1846) 3 C. B. 229.

⁽⁴⁾ (1858) 1 F. & F. 23.

⁽⁵⁾ (1898) 26 Cal. 398.

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for granted that a considerable number of trains passed. Three lines converge on Ujjain, the defendant-company's lines, the Great Indian Peninsula Railway and the Rajputana-Malwa Railway. But the general control of the station is in the hands of the defendant-company. The wagon No. 13024 duly loaded with these 186 bales was finally despatched from Ujjain between 5 and 6 P.M. of the 16th April, being the 42nd wagon on the 62 up train, which consisted of 59 wagons and the guard's van. The contention of the defendant-company is that the wagon was properly and carefully loaded at Ujjain, that none of the coolies employed in loading it smoked in its vicinity, that there were notices prohibiting smoking, in English and Vernacular, that the wagon itself was examined and found not to be in any way defective, that the load was properly sheeted with three fire and water and rot proof sheets, the measurements of which are twenty-five by seventeen and a half, and that the sheeting was rapped and sealed and that all these precautions were verified more than once by the clerk in charge of that business at Ujjain. The train started, and, like nearly every other train running that night on this section of the line, was considerably behind time. The traffic was greatly congested, and there was great lack of water between Bangrode and Rutlam. At a station called Nagda the 62 up was stopped and a down mixed brought up alongside it. The engine of that train must have been close to the 62 up, though the evidence in this case is that it was at some distance from wagon No. 13024. That engine went to water, that is to say must, before the trains parted, have passed some part of 62 up at least three times, and at very close range. No fire was, however, detected, and the 62 up proceeded to Bangrode which it reached between 11 and 12 P.M. on the 16th. Here, owing to the congestion of the traffic, it received

orders from Rutlam, not to proceed. The engine was needed to carry off the traffic which had accumulated in Rutlam; and the Bangrode station officials were ordered to stable this great train, consisting of 59 loaded wagons, at Bangrode. We may assume that if the wagons were loaded with merchandise averaging even only a quarter of the value of that packed in wagon No. 13024 the total value of this load would have been very considerable. I mention this in connection with one of many arguments which may have to be noticed later, namely, that it would be unreasonable to expect the defendant-company to maintain any fire-quenching apparatus at a small inconsiderable station like Bangrode, the average daily takings of which were from rupees five to ten a day. Bangrode is a small station, but it is clear that it is used as a supplementary stabling station to Rutlam, when the accommodation of the latter is exhausted, and therefore may, at any time, be required to shelter goods of great value. On receipt of these orders the 62 up was broken into two parts, one part consisting of fifteen wagons being stabled in the dead end siding, the other consisting of the remainder of the train being stabled in the refuge siding. The shunting operations occupied from one-half to three quarters of an hour, and during that time no signs of fire were noticed. It will be noted that as soon as the first fifteen wagons had been subtracted from the train, the engine, if it had completed the shunting from the rear, would have been the guard's van and seventeen wagons off the burnt truck, and if from the other end 27 wagons off it. In neither case would it have been within a distance which, in the opinion of the heads of the defendant-railway, is dangerous. But presumably in the course of the shunting it must have passed the burnt wagon more than once, at fairly close range. When the whole 62 up was thus stabled at Bangrode

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the engine drew off and waited on the main line at some distance, say roughly 100 yards, from the burnt wagon, with steam up, waiting for permission to proceed to Rutlam. It appears to have stood so, for about an hour and a half in all before it got line-clear and went off with the engine-driver and guard. That was about 1-30 on the morning of the 17th. The actual hours and minutes are of no importance and I am only giving the times approximately. The Deputy Station Master was on duty during the night and superintended the shunting, but neither he nor anyone else detected any fire. Considering where the engine stood, and how long it stood there, and considering that the driver, fireman and guard at any rate were probably awake, it is in the highest degree improbable that the fire which subsequently broke out and consumed all these bales but thirteen could have made much headway at that time, or been visible from without the wagon. The 63 down train from Rutlam reached Bangrode about two hours late, say at 3-30 A.M., on the 17th; and the driver of that train saw smoke rising from wagon No. 13024 at a distance of about quarter of a mile from the station. It was a dark night, no moon, and I doubt whether it is possible to see smoke in such circumstances, unless it is slightly incandescent, and shows a certain amount of glare or light as well as mere smoke. But the engine-driver declares that he did not see any flame or light, only smoke. There is a conflict of evidence, (and a great deal too much has been made of it) whether the fire was first seen by the pointsman sent to prepare the points for the incoming 63 down or by the driver of that train, and who first reported it to the Deputy Station Master. In my opinion it makes not the slightest difference who first saw and who first reported the fact that the wagon was on fire, for it is common ground, and that is all that is important, that the fire was first seen and

reported when this 63 down was entering Bangrode at about 3-30 A.M. The engine of the 63 down was at once utilized to isolate the burning wagon, while all available hands were summoned to help in putting out the fire. Unfortunately the only fire-quenching appliances available at Bangrode were six hand-buckets and a watering can. There is a well with a rope, but the water was very low and it is obvious that little could be done with such means to cope with such a fire as had now developed in this wagon-load of cotton. While the wagon was being isolated it appears that three or four men got on the top and managed to dislodge 25 or 26 bales, with their hands and crowbars. Some of these were already on fire. But as the flames rose, the men could no longer stay on the wagon, and these attempts at salvage had to be abandoned. But if it be true that these men were able not only to mount the wagon but actually to work on it for some time (and something of the kind must certainly have been done) it follows that the fire could not at that time have seized the whole length of the wagon and probably was confined, as alleged by the defendant-company's witnesses on the point, to the centre portion. There is some ambiguity on this point, the witnesses, or some of them, probably meaning by "the middle" of the wagon not the middle portion of the surface, but the centre of the load. The latter statement could hardly be correct if the company's other evidence as to the complete and effective sheeting of the wagon be true. For it would then have been impossible to see into the centre of the wagon at all, and no fire would have been visible until the flames had burst through the sheeting. Nor is it probable that this would first have occurred at the side, although, I suppose, it is possible that it might have done. On the question of sheeting the defendant-company contends that this

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wagon was sheeted with three sheets, while the plaintiffs' case is that it was only sheeted with two. The third sheet is not traceable. The sheeting record book of Ujjain has disappeared. In fact it does not appear to have been kept during the first half of April as the local staff was overworked and unable to fill in all the required records. The evidence, so far as Ujjain is concerned, upon this point is purely general. None of the witnesses can pretend to have any definite recollection of this particular wagon, or how it was loaded, or sheeted or sealed. All that that part of the evidence amounts to is that the usual practice is to load, sheet and seal in a particular way, and that no wagon loaded, as this wagon was, would have been allowed to proceed had it not been so loaded, sheeted and sealed. That is of course merely begging the question, and all such evidence appears to me to be quite valueless and negligible. But at Bangrode we have the evidence of the staff to the effect that the wagon had three sheets on it, of which the middle sheet was totally consumed, not a rag or vestige of it remaining. Considering that neither of the other two were much burnt that appears to me almost incredible. Of course there are different ways of spreading three sheets of these dimensions over a wagon forty-five by nine, and loaded to a height of say five feet. But Mr. Pechey's evidence suggested that the third sheet would be used under the other two, and there is other evidence in the case to the same effect, namely, that underneath sheets are first put over the goods and then sheets over these again. Now if that had been the method of loading here, I mean if the third sheet had been put over the central twenty-five feet of the wagon, dropping down say four feet over each side, and then the other two sheets had been placed over it so as to overlap say ten feet on either side leaving a drop for each of five feet over each end of

the wagon (and that seems the natural way to employ three sheets of these dimensions upon a load placed in a wagon of the dimensions of No. 13024), then it is obvious that that central sheet could not possibly have been so utterly destroyed without doing a very great deal more damage to the overlapping sheets on either side, than the evidence shows was done to them. And I see nothing inconsistent with Mr. Pechey's ideas of efficient sheeting in supposing that two sheets would have fulfilled all the requirements of such efficient sheeting. Two sheets twenty-five feet long by seventeen and a half would of course have covered the wagon from end to end with a drop of two and a half feet at each end and about four feet over the sides, thus leaving three feet of cotton bales exposed at each end and about one foot at the sides. Mr. Pechey says that he is not much concerned with the sides of such loads, as the chief care of the Company is to protect the surface. But recollecting the manner in which engines come close alongside goods wagons, as one train passes another at a station, I confess I do not see why there is greater risk of conflagration on the surface than at the sides from sparks. But as I shall show later I do not think that this point is really important enough to deserve a twentieth part of the time and labour that has been spent over it during the trial. The fire having been discovered at 3-30 A.M. it appears that the Deputy Station Master at once awoke the Station Master of Bangrode, and, as I have said, everything that could be done was done to extinguish the fire. Somewhere between four and five a telephone message was sent to Rutlam for help, and this was received by the Station Master himself who happened to have come on to the station premises a good deal before his usual hours of duty. The Bangrode staff wanted more water; but Rutlam had no water to spare. There is a water train

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of eighteen tanks which runs, sometimes once, sometimes twice, a day out of Rutlam to a small watering station called Ghatla, just half way between Rutlam and Bangrode, that is to say, three miles from either, and brings back its tanks filled to supply the water needs of Rutlam. Rutlam is an engine changing station, and of course if its water supply runs out, traffic is at a standstill. I cannot in this sketch of the facts go into all the considerations pro and con which weighed with the Rutlam authorities, or have been suggested in argument as being such as ought to have weighed with them, on the subject of sending the water train, immediately the telephone message was received, to Ghatla to fill and go straight on to Bangrode. Had this been done, had it been feasible, and the staff at Rutlam are unanimous in saying that in all the circumstances it was not feasible, the water train might have got to Bangrode by about 6-30 A.M. And as far as I can see having got there it would have been quite useless. An immense amount of time has been spent by the plaintiffs over this point of the water train probably as a consequence of the result of *Lakhichand's case*⁽¹⁾. But the short answer to all this argument is that supposing there had been no difficulties in the way of despatching the water train, and supposing it had been despatched and ranged-up alongside (or as near as it could then get) to the burning wagon, what would have been the use? By 6-30 the flames must have been at their height: probably no one could have got within fifteen feet of the wagon (vide Storrer's evidence as to the state of affairs when he reached Bangrode, say a couple of hours later) and with tanks and tanks of water available no impression, as far as I can see, could have been made on the fire by tossing buckets of water at it from a distance of fifteen feet. What was needed, what

(1) (1911) 37 Bom. 1.

alone would have been serviceable, was not only water in abundance but a hose and pressure pump as well, and there was no available hose or pressure pump at Rutlam, or at any place nearer than Godhra, 115 miles away. I may have to discuss this part of the case in a little more detail later, though I have long ago felt convinced that it really has little or no materiality if it can even be said to be relevant. For the present it is enough to say that the Station Master of Rutlam did not send the water train but ordered the Bangrode Station Master to take the drinking water tank off the up train which would reach Bangrode about 10 or 11 A.M. In the meantime the Kotah special had proceeded from Rutlam and found the wagon blazing at Bangrode. That would have been between 6 and 7 A.M. The engine-driver gave all the water he could spare from his tender, but this was useless, so he took his train on. Then followed the 17 down mixed, with Mr. Storrer on it. No mention appears to have been made of the fire at Bangrode to anyone on either of these trains, except the guard of the latter, who says (in opposition to all the rest of the evidence on this point) that it was common knowledge at Rutlam before his train left. When the 17 down got to Bangrode between 8 and 9 A.M. the engine was taken as close as it could get to the burning wagon and steam was blown upon it, seemingly more to enable the mixed train to get by than with any hope of putting out the fire. Then the 17 down went on its way leaving the wagon burning as hard as ever. In the meantime two telegrams appear to have been sent from Bangrode, one the formal "to all concerned" and the other, sent later, a special telegram to the Station Master at Rutlam for more water. The "all concerned telegram" certainly suggests that the fire had done its work completely and that there was no hope of saving anything. But

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the other telegram asks for more water, and this appears to have reached the Station Master shortly after 8 A.M. He thought the best thing to be done, indeed the only thing to be done in the circumstances, was to order the Station Master at Bangrode to arrest the drinking water tank which would shortly come to his station ; and this was duly done about 10 or 11 A.M. But when its whole contents had, like the spare water of three previous engine tenders, been thrown at the wagon out of the six hand buckets and watering can, naturally without the least effect, the staff at Bangrode gave the fire up as hopeless, and left the wagon to burn itself out. This it did in about two days from the commencement of the fire. Of the 26 bales which had been flung from the top of the wagon when the fire was first discovered 13 appear to have been saved ; the remaining 13 which were left lying about already on fire were burnt and utterly destroyed. As to that the position of the Company might be different had its liability to be determined solely with reference to the manner in which it discharged its obligations not only in the way of taking precautions against risks, but in dealing with the situation when in spite of those precautions the risks had actually occurred. For it is hard to see how, had any attention been paid to these smouldering bales lying on the ground, a few buckets of water thrown over them at once would not have finally put them out, and saved them, subject of course to whatever damage they might have suffered before being dislodged from the wagon top.

Those being in outline the principal facts, what are the legal rights and liabilities of the parties ? I do not see that sections 72 and 76 of Act IX of 1890 put a railway company sued in respect of goods entrusted to it for carriage in a better position than a common carrier under the old Carriers Act. Nor do I think it necessary

to go minutely into any change which the Act of 1890 may have made in the liability of railway companies, when sued as bailees, as compared with their liabilities before the passing of that Act. For, as it stands, the law appears to be clear. When anyone has entrusted goods to a railway company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Contract Act but no general rule universally applicable can, I think, be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus. It cannot be a rule of law, though speaking generally, I think it is a very sound rule of right reason, subject to all proper exceptions in special cases, that where the fact of loss, damage or destruction is proved, and the railway company cannot prove the cause of this loss, etc., it cannot logically prove that it is not in law itself responsible for that unascertained cause. While on the one hand it is fair argument to say that a bailee who has goods in his sole possession and under his sole control and loses or allows them to be damaged or destroyed must show, first, how the loss or damage was occasioned before he can be heard to say that it is not due to his own negligence, it is going too far in the other direction to maintain that it is a universal rule of law in such cases that where the bailee is unable to assign the true cause of the loss or destruction he must in every case be liable for the value of the goods to the bailor. In every case it is open to the bailee to satisfy the Court, if he can, that although he does not know how the goods came to be lost, damaged or destroyed, it certainly was

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not owing to any want of ordinary care on his part. And this was actually done in the recent case of *Lakhichand Ramchand v. G. I. P. Railway Company*⁽¹⁾. There the defendant-company could assign no cause for the fire, but the trial Court was satisfied that whatever the cause might have been it was not due to the negligence of the defendant-company, and in this view the Court of appeal concurred. The defendant-company in this case has from the first relied, in my opinion, much too confidently on *Lakhichand's case*⁽¹⁾ as establishing a rule of law that a defendant-company sued, as this defendant-company is sued, may exonerate itself by proof of general care, in dealing with large quantities of similar goods, and proving that that amount of care is usually sufficient to prevent loss, damage or destruction. On the other hand the case is certainly an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of the loss. Now what is the actual position at the outset of the case? The defendant-company has received goods to be carried at its own risk. Instead of delivering them, it allows them while in its sole possession and under its sole control to be burnt. Two main questions then arise—(1) Has the defendant-company proved that it took as much care of the goods from the time they came into its possession to the time when they caught fire as an ordinary person would have taken of goods of the like quality and quantity of his own? (2) When the goods were found to be on fire did the defendant-company take as much care of them, that is to say, did it exert itself as strenuously having regard to the means at its disposal

⁽¹⁾ (1911) 37 Bom. 1.

and all the circumstances to put the fire out and save the goods as an ordinary person might have been expected to do if the goods had been his own? It will be noted at once that the second question is totally distinct from the first, and, in regard to the proof, has to be dealt with on a different line of reasoning altogether. The defendant-company might succeed, as in fact, it did succeed in *Lakhichand's case*⁽¹⁾, in exonerating itself so far as the origin of the fire was in question, and yet fail as it did in that case to exonerate itself when the question was of the duty it owed its bailor after the fire had been discovered. And that distinction is also of some importance with reference to Batchelor, J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Company v. Choutmull Doogar*⁽²⁾. With respect I am unable to agree wholly either with the line of reasoning or the conclusion reached by Batchelor J. in that part of his judgment. Presently I will explain more in detail why. Now in this case the defendant-company comes into Court and professes a total ignorance of how the fire was caused. In effect its case is this. We always take care, as much care as any ordinary owner would himself take, of goods committed to our care for carriage. This is proved by the fact that while we carry enormous quantities of cotton, just as this cotton was carried, in open wagons, we rarely let it get on fire. Tables have been put in for three years to show that the company has lost very little cotton in transport by fire. Therefore, it is contended, we must be exonerated in respect of this particular fire. Now I may at once say that that appears to me an entirely fallacious piece of reasoning. Doubtless a very similar course was taken by the defendant-company in *Lakhichand's case*⁽¹⁾, and

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⁽²⁾ (1898) 26 Cal. 398 : L. R. 26 I. A. 1.

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it proved successful. And the whole defence in this case has been modelled upon the defence in *Lakhichand's case*⁽¹⁾. But it can never follow as a matter of law that what satisfied a Judge in one case with special reference to the facts of that case must always satisfy every other Judge in dealing with cases in which the problem may be in many respects different, the facts either more simple or more complicated and the grounds of inference therefore always liable to change. As to the defendant-company's liability for what happened after the fire was discovered, that must always be relatively simple and easy to determine compared with the first question, namely, was the defendant-company, in the absence of any known cause, liable for the origin of the fire? And it is clear that if that question be answered in the affirmative the second question would lose all practical importance. Now let me explain in a word or two why, I think, the very simple reasoning upon which the defendant-company mainly relies, professing to borrow it bodily from *Lakhichand's case*⁽¹⁾, is fallacious. Assuming that the defendant-company has carried, say, 6,00,000 bales of full pressed cotton, in all respects like the full pressed cotton which was burnt in wagon No. 13024, and carried them safely, with no greater percentage of loss than, say, 250 bales out of 6,00,000, how is that an answer to the fact that these particular 186 bales were set on fire while being carried by the defendant-company? Surely it is rather worse than no answer. For again assuming that exactly the same precautions were taken with these bales as with all other bales, and that in the vast majority of cases the bales reach their destination safely, does it not follow of necessity that since in fact these bales were burnt, the company must have exposed them to some extraordinary danger? Upon the defendant-company's reasoning it is certain

⁽¹⁾ (1911) 37 Bom. 1.

that one of two things must have happened, assuming that their propositions be true. Either the ordinary precautions were *not* adopted in loading these bales, or they were exposed to extraordinary danger. In either case if the act was the company's—a point I will develop in a moment—it appears to me to follow that on the facts thus stated and admitted, to go no further, there is a clear case of negligence made out. I cannot myself see how evidence, that as a rule bales are carefully loaded and in consequence reach their destination safely, can really have any relevance in the defendant's favour, although, no doubt, once believed, that kind of proof would acquire a distinct cogency against the defendant-company as making it certain or almost certain (in the absence of any known or even suggested cause external to the company and its servants and machinery) that these particular bales were *not* treated with that degree of ordinary caution all along the route which has ensured the safe delivery of so many thousand other bales. I have read a great many cases, to which I have been referred, and carefully analyzed their contents, and I have very little doubt about what is the law in cases of this kind. The company as bailee is primarily liable for the loss but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the company's control. I should always feel that there was a logical difficulty in accepting such a demonstration in a case like that with which I am dealing. But in cases of loss, it might very well be that the bailee might show that he had taken all reasonable care of the goods and yet that some person unknown had stolen them, and so they had disappeared. Here in a sense the cause of the loss is unascertainable and yet the bailee might

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exonerate himself. But that could only be by satisfying the Court that the cause of the loss was external to himself, and beyond his control. The commonest case perhaps would be spontaneous combustion if that ever really happens.

But that again is not truly a case of an unknown cause, for once assigned and believed it is a complete and efficient cause and explanation. But the unknown felonious acts of others (which according to high authority ought never to be assumed), again narrowing the ground of this particular species of defence, or acts of others in no sense felonious but merely careless and guessed at as a cause, almost exhaust the category of unassigned causation external to the defendant-company itself which would be likely to be acceptable in a Court as a sufficient possibility, and, when consistent with the proof of ordinary care, probability, to exonerate the bailee. Second, the bailee while ignorant of the *vera causa* might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. But such a defence could, I apprehend, only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

But I should think that it would be extremely hard for a defendant to make good such a defence, although, no doubt, it has been done. Those cases must, I think, be very rare in which a bailee, having the sole custody and control of the goods and losing or destroying them without himself knowing the cause, would be able to satisfy a Court that whatever the cause was it *must*

have been attributable either to some agency external to his own and beyond his control or to some thing so unusual and unpreventable that he could not in reason have been expected to guard against it. And that in effect is the law laid down, as I understand it, in *The Rivers Steam Navigation Company v. Choutmull Doogar*⁽¹⁾. Lord Morris is very careful throughout his judgment to insist upon the need of such evidence as he examined on this point showing that the fire was caused by something or somebody external to the defendant-company and beyond its control. His reasoning on that part of the case, which should not be confused with his reasoning upon the second part, namely, whether apart from the origin of the fire the company was liable for negligence in not having detected it sooner, may, I think, fairly be thus summarized. The defendant-company had these goods in their exclusive possession and control. They allowed them to get on fire, and can assign no cause whatever external to themselves and their agents, nor can lay any solid foundation for the inference that the *vera causa* of the fire might have to be sought there, (his Lordship's examination of the evidence does not seem to me to have gone beyond this upon that part of the case) therefore they are liable. In other words, having regard to the natural course of events and the admitted facts, the fire must have been caused by some act or neglect of the defendant-company, since it undoubtedly *was* caused, since a fire is not an ordinary event to be set down as an usual incident of transport, and since no one else, so far as the evidence on that point goes, could reasonably be held to have caused it, the defendants and no one else are answerable for the fire, and were the cause of it. This does of course go very near laying down as a rule of law that where the bailee who has

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the complete and sole control of the goods bailed, loses or destroys them, and cannot prove the cause, the legal inference is irresistible that the cause is attributable to him and that, looking to the result, it must have been due to negligence. For fires are not caused except by negligence, though what the degree of that negligence may be would often depend upon all the facts being known, the true cause ascertainable. It would, I apprehend, have been no answer to the plaintiff's case in *Choutmull Doogur v. The Rivers Steam Navigation Company*⁽¹⁾, in the opinion of the Privy Council, had the defendant-company proved that it had carried thousands of loads of jute under similar conditions without losing a drum by fire.

From this brief analysis I deduce the following general principle, that where a bailee cannot assign the cause of loss he may always give evidence to prove, if he can, that although unknown, the cause *must* have been external to himself and beyond his control. Failing that, to exonerate himself he would have to prove that, while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions. Thus, of course, it will always be open to a bailee defendant to give evidence, although he has no hope of discovering the cause of the loss, to prove that it was beyond his control, and that he is not answerable for it. While such evidence would always be relevant and needs to be examined, should it fail of its purpose, the mere fact that it was relevant and examined would not materially detract from the ordinary presumption of right reason, that a man, who has had the sole custody of goods and has destroyed them without knowing how, is himself responsible for the destruction. Such, I understand,

⁽¹⁾ (1897) 24 Cal. 786.

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was the view of Palles C. B. in *Flannery v. Waterford and Limerick Railway Co.*⁽¹⁾, a judgment in which the nice points arising in all cases of the kind are treated with a subtlety and thoroughness that, I think, is rarely to be found in the judgments of the English Courts. Such too, I think, was the opinion of Erle C. J. in *Scott v. The Uxbridge and Rickmansworth Railway Company*⁽²⁾ and the same doctrine was expressed in a sentence by Scrutton J. in a very recent case, *Hurlstone v. London Electric Railway Company*⁽³⁾.

What is the evidence in this case? An immense amount has been accumulated, (but I may say at the outset that in my opinion at least 90 per cent. of it will never be relied on, or even looked at again,) during the much too protracted trial. I repeatedly protested but both sides appeared to be equally desirous of heaping up evidence, apparently with the idea of making the case appear to be much more difficult and complicated than in my opinion it really is. A common reply was that days were spent over a similar point before Mr. Justice Robertson or Mr. Justice Heaton; and it looks as though the bar had accepted a standard pattern (and I think a very bad standard pattern) for all cases of the kind. But where both sides are rich, and money appears to be no object, then naturally neither side likes to yield to the other in a plausible desire to lay every possible fact, material or immaterial, before the Court. Proof, if any were needed of the almost ridiculous superfoetation of evidence in this case, is given by the simple fact, that in their final addresses Counsel on both sides hardly referred to the evidence at all. Mr. Binning for the defendant-company occupied about an hour and a half dealing almost entirely

⁽¹⁾ (1877) Ir. R. 11 C. L. 30.

⁽²⁾ (1866) 35 L. J. C. P. 293.

⁽³⁾ (1913) 29 T. L. R. 514.

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with generalities, with an occasional digression of which the object was to defend one of his witnesses from what he thought unjustifiably severe strictures, while Mr. Inverarity took perhaps an hour longer, but devoted almost all that time to a discussion of the law and English cases illustrating his main points.

The evidence, such as it is, breaks up naturally into three main divisions: (1) the evidence of the Ujjain witnesses intended to prove that all proper care was taken of the goods while loading, and that when loaded they were sheeted in the ordinary way, roped and sealed. That nothing was wrong with the wagon itself, and that therefore up to that point the defendant-company could not possibly be held guilty of any negligence; (2) the evidence relating to the journey between Ujjain and Bangrode; (3) the evidence relating to Bangrode, which again has to be sub-divided into evidence relating to what happened before, and after the fire was discovered. The latter evidence includes all the Rutlam witnesses and the drivers, firemen, guards, etc., as well as the passenger, Storrer, on the train which left Rutlam and reached Bangrode after the fire had been discovered. This evidence also includes the train, which brought the water tank of which use was finally made, from Nagda.

Now a very little thought will show that most of this evidence must be valueless. Indeed, in spite of the length at which witnesses were examined and cross-examined, hardly a single fact which can help the Court is really disputed. Thus, for example, it is of course useful to know what trains passed the 62 up on its way between Ujjain and Bangrode, and how long the foreman was in close proximity with any or all the latter. But such facts could have been elicited without dispute in five minutes from any of the defendant-company's responsible servants. On the other hand the evidence is *not*

explicit as to what trains passed the wagon, or at what distance, while it was being loaded at Ujjain. And I shall presently have to point out that the want of this information might tell seriously (though as the facts stand I do not think it does) against the defendant-company. Before I demonstrate, as I hope to do conclusively in a little while, that I have not exaggerated the worthlessness of most of the evidence, I will point out that the origin of the fire admits of only three practical possibilities: (1) that it was caused while the wagon was being loaded or after being loaded was waiting despatch at Ujjain; (2) on the journey between Ujjain and Bangrode; (3) at Bangrode between the time of its arrival there at about 11-14 P.M. and 3-30 A.M. It is only the first of these three possibilities which offers the defendant-company any chance of satisfying the Court that the origin of the fire was not due to any act of theirs. For after the train with this wagon, making part of it, started for Bangrode, it cannot be contended that if the fire was caused by any act at all, and not due to spontaneous combustion, that act was not the act of the defendant-company or some of its servants. My opening analysis of the true content of the main propositions upon which this doctrine depends, as well as of the true content of that doctrine applied to any particular case, brings out clearly, I hope, the great importance of this factor in the reasoning. For if the act cannot possibly have been an act external to the defendant-company, that is to say, if it is not humanly speaking possible, that anyone but the defendant-company itself caused the fire, then the further fact that the defendant-company is not in a position to show what the act was, who did it, or under what conditions it was done, virtually deprives all general evidence of ordinary care taken in this, as in innumerable other cases of like goods in quality and quantity, of all probative, or at any rate logical, value. The furthest such evidence could go in such circum-

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stances would be to open a possibility of the origin of the fire having been due to some cause so extraordinary and unusual (the intentional felonious acts of any person being now entirely excluded since such are never to be presumed) that although in a sense the defendant's own act, the defendant could not be charged with liability in respect of it. Virtually the only real exception to this rule, I think, would be a true case of spontaneous combustion, a cause which is as truly external to the defendant-company as though the wagon had been set on fire by a passing engine belonging to some other company, or by a flash of lightning. But in this case the defence of spontaneous combustion was explicitly abandoned before the trial. At the close of the case Mr. Binning urged that while this was so the defendant-company never meant to say that the fire may not after all have been a case of spontaneous combustion; all that the defendant-company meant was that they were not in a position to prove this, and did not mean to try. But, I think, after the correspondence which passed on the point, it would be wrong for the Court to entertain that cause as even a possibility. For the plaintiff had expressed his intention of calling expert evidence to convince the Court that these bales could not have caught fire of themselves, had that defence been directly or even indirectly persisted in. I must, therefore, deal with the evidence on the assumption that whatever the cause of the fire really was, it was not spontaneous combustion. And I may add that I do not believe that full pressed bales of cotton ever would ignite in that way. I do not know whether a single case has ever been scientifically proved, by which I mean that every other possible and ordinary cause, such as smoking in the vicinity, sparks, etc., has been rigorously excluded. There may be many cases, both on railway lines and in godowns, where large quantities of cotton have been burnt and no cause has been discoverable. Some of these

may have been attributed to spontaneous combustion. But had all the facts been known, as they never are in such cases, a simpler and more natural cause would probably have been discovered. For it must be admitted that the consensus of scientific opinion while favouring the bare possibility is strongly against the probability of the occurrence of spontaneous combustion in pressed cotton. If such a cause is always to be regarded as extremely remote and unlikely, although just possible, it is hardly necessary to seek for it among half a dozen quite ordinary, probable, and natural causes. Here, for instance, the burnt bales have been exposed over and over again to contact with passing sparks, and even if we exclude chance kindling from careless smoking while the bales were being loaded there are enough probable, not to say possible, causes of a very ordinary kind, to render it unreasonable to go out of our way (as some members of the defendant railway staff appear to have done in the early correspondence) to ascribe the fire to such a very exceptional and questionable cause as spontaneous combustion.

It has never been suggested, I think, in this case that the cause of the fire may have been due to the friction of the iron hoops round the bales. This was put forward and, I believe, seriously considered in the former case. But standing alone it can hardly be regarded even as a possible cause. I am pretty positive myself that, without some added factor, some defect in the wagon bringing some of its parts while in motion in contact and violent contact with these hoops, no amount of ordinary friction in transport could suffice to generate a fire. Were that really so it must be a matter of averagely frequent recurrence, and having regard to the millions of pressed bales of cotton which are annually carried over hundreds and hundreds of miles of railway without a single case of this kind ever having been proved to

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occur, I think I may safely disregard this conjectural cause. I have laboured these two points more than I should otherwise have been disposed to do, because, the whole of my reasoning must ultimately depend upon a logical process of exclusion. I have to exclude all possible causes external to the defendant-company before I bring the problem into a narrowed focus, within which the application of what I conceive to be not only the governing principles of law, but of right reasoning, can be easily and clearly applied. I will now turn back to the Ujjain evidence which was quite unnecessarily voluminous. I think it is entirely negligible for this main reason, that in the admitted facts, I do not believe that the fire did or could have originated at Ujjain. It will be observed that from the first, and in some parts of the oral evidence at the trial, the defendant-company attempted to show that the fire when first seen was in the middle, meaning the heart of the wagon. Of course, if that were so, its cause could not have been external ignition in transit, either at Nagda or at Bangrode. Some of the lowest or lower tiers of bales must have been set on fire at Ujjain while the wagon was being loaded, and the others being heaped upon them, and the whole load sheeted down, the fire must have slowly smouldered from 14th April when the wagon appears to have come in from Rutlam—or I should perhaps rather say from the moment it began to be loaded in Ujjain, up to 3-30 A. M. on the 17th when the flames were seen at Bangrode. Now books of authority certainly do say that cotton may smoulder almost indefinitely, once ignition has thus been partially started, and it is not absolutely impossible that sparks of some sort may have fallen upon and lodged among the lower or middle tiers of bales while the wagon was being loaded at Ujjain. But I should think that ordinarily, if such a thing happened, the almost immediate superimposition of other bales would have

a very strong tendency to crush out a merely smouldering spark on the surface of the bale below. And although if the smouldering cotton were stationary, it may be that the process of ignition is sometimes extremely slow, this must be less likely to be the case where smouldering cotton is being dragged through the open air at a fairly high rate of speed. Although sheeted, a wagon like this would admittedly have had a foot or so of the lower part of the load exposed to the air, and if the origin of the fire had been as suggested by the defendant-company, something which happened at Ujjain (I mean something beyond their own control) beginning in the lowest or lower and middle tiers, then it appears to me hardly possible that the fire should have remained unnoticed, merely smouldering from, say, the 15th April to the early morning of the 17th. The fanning wind made by the moving train would have been just about the level where the fire is, on this theory, originating, and surely long before the train had completed its journey to Bangrode, the smouldering centres would have broken out into flame. That is one reason, though it may not be deemed conclusive, for dismissing the whole Ujjain evidence. For, if the fire did not originate in Ujjain, it appears to me perfectly useless and bad reasoning to pile up evidence of careful loading at that place. However careful the loading, it was not careful enough. Either it was *not* careful, or the wagon was later exposed to heightened and unnecessary risk. Else there had been no fire. That I should have thought self-evident. And in this connection I will pause upon Mr. Binning's concluding presentation of his case. That learned Counsel was evidently as alive as I am to the rather absurdly disproportionate amount of evidence he had laid before the Court, for no better reason that I can see than that this had been done before in other Courts, and was the approved way of conducting a railway company's defence. For he

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virtually gave the go-by to the whole of his evidence resting his case on a syllogism and a very bad syllogism. He said in effect that the sum of the whole matter was this, the kernel lying in certain statistical statements put in by Mr. Pechey. The defendant-company carries enormous numbers of bales every year. We have shown by these tables that relatively very few get burnt. Therefore it follows inevitably that we take ordinary and reasonable care of all goods that are entrusted to us for carriage. The staring fallacy lies in the conclusion and the use of the word "all." The true syllogism is this. We carry innumerable bales every year loaded with ordinary care and upon an uniform principle. None of these bales get burnt. These (and a few rare cases to be found in our tables are of the same nature) did get burnt. Therefore it is clear that either our ordinary usual precautions were *not* taken with these bales, or that something very unusual happened which rendered precautions, ordinarily sufficient, insufficient in the case of these bales. Now what was that? Here the defendant-company is silent, merely saying that we do not know, we have not the slightest idea. But whatever it was it was not our fault.

But another and more cogent reason for disregarding the whole Ujjain evidence is that upon examination it turns out that none of the witnesses who give it really has or possibly could have definite recollection of this particular wagon. All they can say (the superior officers from such records as are kept) is that wagons are always loaded and sheeted and sealed in a particular way, and that as there is nothing on record to show that there was any defect in the construction of this wagon, or anything wrong in the way it was loaded, and as it was allowed to start on the evening of the 16th April, it must have been, etc., etc. Vinayak Vaman for

instance says that he examined the wagon three quarters of an hour before it left, but here he can only be speaking of his general practice, just as he is when he says that had bales been projecting he would not have allowed the wagon to go. Every one acquainted with the ways of station staffs up-country will easily rate such evidence at its true value. We have a photograph put in by the defendant-company of an ideally sheeted wagon, which makes it appear as though the whole load were completely swathed in sheeting, and then we have half a dozen photos put in by the plaintiff of wagons belonging to the defendant-company in which the load appears to be bulging out and is certainly considerably exposed. Except as showing that the perfect ideal of loading offered to the Court by the defendant-company is, to say no more, sometimes departed from, I do not attach much value to these pictures. Nor do they seem to be necessary, for two main reasons. One is the evidence of Mr. Pechey which makes it quite clear that not much concern is shown in loading wagons for the lower part of the side of the load. This must in almost every case of a fully loaded open truck, if Mr. Pechey is right, be exposed. And the next and far more decisive reason is that the evidence of two chemical analysers in this case proves conclusively that these very sheets, which are intended to protect the cotton against fire, are themselves rather more inflammable than cotton itself. If they afford any additional protection against ordinary sparkage at all, it must be rather on account of their surface than texture. Very likely a passing spark would have less chance of finding a dangerous resting place upon the surface of one of these sheets, than upon the centre of an uncovered set of pressed bales. But not much more can be said in favour of the sheets as a protection against fire. If they are at all loose and wrinkled on the top of the bales, thus, forming ridges, as in Captain Higham's experiment, it appears

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that they would offer a comfortable and secure lodgment to a dangerous spark, and would be almost certain if then set in motion to break out into flame. They appear to be saturated with a fatty substance, the main object of their manufacture being apparently to make them water, and not fire, proof. This wagon was in process of being loaded at Ujjain from the 15th to the evening of the 16th when it was sent off on 62 up train to Bangrode. All the coolies available have been called and unanimously declare not only that they never smoke themselves, but that they don't know what *bidis* and *hukkas* are, and that some of them have never even heard of smoking or seen anyone doing it even in the town of Ujjain. This is simply absurd and indicates the true value of most of the Ujjain evidence. But taking it to be true, it excludes one very simple cause of the fire, assuming that the fire could have been caused at all at Ujjain and yet remained undiscovered till 3-30 A.M. at Bangrode. As far as Ujjain is concerned then we should be limited in our search for a cause to some spark thrown on the bales in process of loading by a passing engine, not belonging to or under the control of the defendant-company, but there is no evidence of anything of the kind, and although engines belonging to other companies do pass through Ujjain, the general control of the traffic and loading there is in the hands of the defendant-company, and it is just as much their business to see that nothing uncommonly dangerous in the management of engines, which they permit to pass, is done, as it would be were they dealing with their own engines. Now as to the sheeting of the wagon. The Ujjain staff cannot produce their sheeting record. Apparently they were all so overworked at that time, that they were unable to write up records, which in the ordinary course they were bound to keep. And this, I may observe, is worth considering in connection with the evidence of such

witnesses as Jamnadas and Vinayak Vaman. In such circumstances it is easy to understand that they might have relaxed some of their ordinary precautions and the rigour of their rules of inspection. But at any rate we have no evidence worth the name of how many sheets actually were placed over this particular load of 186 bales. The first report, made by a responsible officer of the company as the result of personal enquiries at Bangrode after the fire, suggests that the staff there were of opinion that only two sheets had been used. Much evidence in this case has been led to prove that three and not two sheets were used. I do not think the point very material for reasons which have already been given. But it appears to me more probable that only two sheets were used, than that the third should have been utterly consumed leaving not a trace behind while the remaining two were but very slightly burnt. This is barely possible, if the fire, when first discovered, was confined to the middle of the truck, which for the purposes of this conjecture may be taken to have been covered by the third sheet. For then the first thing the local staff would have done would have been to pull off the remaining two sheets, while the fire may have got such a hold on the third as to render any attempt to save it useless. Its inflammable composition would also have contributed to its speedy and total destruction. The length of the wagon is 45 feet, and as I pointed out in an earlier part of this judgment, if three sheets were used in the manner suggested by Mr. Pechey, the central sheet would have been overlapped by the two end sheets to, say, the extent of ten feet or so, leaving a space in the middle through which the flames may first have broken. But the point appears to me to be of absolutely no importance, and the extent to which it has been laboured is of a piece with the rather senseless determination to accumulate evidence, rather than first

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reason out the content of the problem to be solved, which has characterized the conduct of the parties on both sides. For it is perfectly obvious that three sheets would not necessarily afford complete protection, where two failed to do so, although, (unless the ignition of the sheets themselves was the true cause of the fire in which case no number would have increased the security of the load but would rather have heightened the risk) using three would have left rather less of the load exposed than would have been exposed had only two been used. According to Mr. Pechey's idea two sheets would have been quite adequate covering for such a load as this; the whole of the top of the load would have been covered, only about a foot of the lower sides, and two or three feet of the ends of the load would have been exposed. But the fact remains that whether two or three or thirty sheets were used the load caught fire, and there is nothing to show that increasing the number of sheets, under certain conditions of danger, would have increased the degree of protection.

Let it then be supposed for the rest of the argument that wagon No. 13024 left Ujjain loaded with 186 bales sheeted with either two or three sheets (in my opinion it makes not the slightest difference) duly roped and sealed, wagon in good running order, load so far safe and un-ignited. Will this state of preliminary facts exonerate the defendant-company? They appear to have thought that it would. In my opinion it does not. They have still to account for the manner in which notwithstanding all these ordinary precautions having been taken, a most unusual thing happened, namely, how the wagon came to be on fire at 3.30 the next morning. Their reply would probably be we have shown that in loading and despatching the goods we took as much ordinary care as a prudent man would have taken of those goods had they been his own. We are therefore freed of all liability

under sections 151 and 152 of the Contract Act. That is a view which I cannot adopt. It appears to me to violate not only well settled law, but all canons of reasoning. Before the defendant-company can be exonerated they have yet to satisfy the Court that, while the goods were in transit and under their exclusive control, they took every proper precaution, not only in the packing of the goods, but in the management of their numerous, dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor, which they could not with reason have been called upon to anticipate and guard against. And on this point the defendant-company is utterly silent. Absolutely no evidence has been given of the manner in which they manage their engines, when these have to pass close to loads of valuable merchandise. If they could have proved that they have adopted every means known to science to neutralize the recurrent risk of sparkage; if they had proved that none of their engines were ever allowed to pass, particularly at night, close by loaded wagons containing highly inflammable goods without shutting off steam, and that after every such quite ordinary risk had been run, inspection was taken of the wagon which had been exposed to the danger—and all these appear to be quite ordinary precautions which any man would naturally take to protect his own very valuable property—then the defendant-company might fairly have said to the Court, we have now proved that we did everything in reason to take care of these goods, and we have no idea how in spite of having taken all those precautions, the fire occurred. The answer (not to that appeal which would then be perfectly legitimate, but to the supposed need of ever making it) would be that in such circumstances,

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it is almost impossible that any fire should occur or that the defendant-company would be called upon to account for it.

Before I deal with the question of sparkage which, in my opinion, is the most important in the case, if indeed not the only important one, I will say a few words upon another point upon which an entirely disproportionate amount of time and quantity of evidence has been wasted, I mean the manner in which wagons of this kind are loaded. The defendant-company stoutly maintain that fully pressed bales loaded in open trucks are always laid end to end within the truck, and then tier on tier till the full tonnage of the wagon is reached. The plaintiff on the other hand contends that it is a common practice for the defendant-company to load these bales in a very peculiar way. The length of a fully pressed bale is 4'1 and the interior width of one of these wagons is 9 feet. Thus laid end to end on the floor there would be a space of eight inches between. The plaintiff, however, contends that the bales are commonly made to project anything from six inches to a foot over the rail of the truck. This rail is six inches high. Thus, if the plaintiff be right, the bottom tier of bales would be lying at an angle of about six inches in thirty-six. This would leave space between for placing a third row of bales upright. The width is 1'8. There is of course absolutely no evidence to show that wagon No. 13024 was loaded in this singular manner, but Mr. Inverarity relies on his pictures to show that in some wagons fully pressed bales do appear to be projecting slightly. Mr. Pechey appeared to doubt whether in one instance at any rate the bales were fully pressed, and if they were not but the common *dokdas* of unpressed cotton no inference could be drawn from the appearance of such a load to exceptional methods of loading fully pressed bales.

Apart from Mr. Inverarity's pictures, which are not very convincing, I should certainly have thought that the method of loading he suggests is so inconvenient and purposeless that no sensible loaders would ever have recourse to it. Every tier would be tilted down to the centre and the whole load would, I should think, be so unstable as to be likely to fall while in transport. But Mr. Inverarity appears to think that the notion is to wedge the two outside tiers by the central row of upright bales so as to fix them more firmly than if they were merely left lying on the floor eight inches apart. I do not think in the first place that the plaintiff's point is of any importance. It is true that if the ends of a lot of uncovered bales were projecting with an upward tilt, say six inches beyond the wagon, and uncovered, they would be much nearer a passing spark and might offer it a more comfortable resting place. But the absurdity of the argument lies in this that there is absolutely no evidence to prove that this method of loading is universal (and I should think every probability points the other way) or that the particular wagon was loaded in this way. It is going much too far afield to ask the Court first to hold that out of four or five thousand wagons one or two are loaded in this way on the strength of one or two photographs taken of wagons at rest in the Colaba Station (and for all we know partially unloaded or prepared for unloading) and two at rest in Broach and Surat respectively, and then to conclude that this wagon must have been loaded in that way and so exposed to an increased risk. Had it been so then the evidence pointing to the fire, when first seen, being in the centre of the wagon, would be made more credible. All I can say is that there is no evidence whatever that would warrant me in holding that this wagon was loaded in such a singular manner. I am inclined to agree with Mr. Pechey that no one but a fool would think of so

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loading an open truck. It is not as though by doing so more goods could be got into the wagon. Loaded in the ordinary manner the full tonnage of the wagon could be easily exhausted without the load being in excess of the prescribed height. But it cannot be denied that the plaintiff's photographs have this degree of value, supposing that they are not explainable or qualifiable on other grounds, that when the defendant-company with its picture of a completely sheeted wagon asserts, we invariably load every wagon in this manner, the pictures show that there are exceptional cases in which the defendant-company does not. But I do not understand Mr. Pechey to contend that there are *not* exceptional cases. There always must be over a great railway system in this country manned, as far as loading operations go at all sorts of out of the way places, by ignorant, careless and idle natives. But where goods catch fire, the case every time must be exceptional and some exceptional feature must have been introduced. Else we should have the proposition, all goods loaded with ordinary care, according to our usual loading practices, and carried in the ordinary way, get burnt, which is absurd. Where they *do* get burnt these questions arise. What was the exceptional feature which brought about the exceptional result? Was it some act of the defendant-company? And, if so, was it some act which they ought not to have done in the exercise of ordinary care and prudence? Whether the exceptional feature, the cause of the fire, lay in the loading of the wagon or in the manner in which the defendant-company managed the traffic, through which that wagon had to pass, matters nothing. It is here, I think, that the defendant-company, perhaps misled by the G. I. P. Railway Company's rather easy success in *Lakhichand's case*^(a), have been lulled into a false security. They appear to have thought throughout the trial, that if they could get the Court to believe that this

wagon was loaded with ordinary care, they had done all that was needed to absolve themselves. In my opinion it is not so. They are still, in the absence of a definite known cause, to satisfy the Court, that in the management of their engines, in the whole course of drawing this truck from Ujjain to the place (wherever that was) where it caught fire, they observed in all respects the same degree of care and prudence which an ordinary man, conveying his own valuable goods, might have been expected to take under the same conditions.

Then how does the evidence stand about this? It is certain that the 62 up was passed at Nagda by another of the defendant-company's train, the engine of which went to water, that is to say, must have twice passed part at least of the train on which the burnt wagon was, in performing that operation, and once in ordinarily crossing it, that is three times in all. The engine must have started to water, and it is at starting that sparks are likely to be emitted more freely, just as they are under any other condition of strain, as for instance going uphill. It is pretty clear from parts of the defendant-company's own correspondence that some suspicion attached to this incident, and that it was at once seen to have been a possible—not to say a probable—cause of the fire. The only thing to be said against it is, that the fire was not discovered till some four or five hours later; and if a spark from this engine had set the truck on fire by lodging on the sheeting, then as the train moved from Nagda to Bangrode, it is pretty certain that the wind would have fanned the fire into a blaze and that it could not have escaped detection during the later shunting operations at Bangrode, which occupied about 45 minutes. But it is at least possible that the spark (if it was a spark here which set the wagon on fire) lodged in the lower tiers of the uncovered bales, and worked its way smouldering

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inwards, till later on it set the whole wagon on fire. However that may be, here is an obvious, a natural and possible cause. And, if it were the true cause, could it be said that the defendant-company had taken all reasonable care of the goods in train 62 up, although they allowed this engine to pass and re-pass close to the loaded wagon? I doubt it. I am sure that any private owner who had been so situated would at least have taken some precautions to minimise the risk of the engine throwing out sparks, and that he would probably also have been on the watch to see, that no spark in spite of such precautions had actually lit on and was likely to set fire to his goods. If the fire had not been caused by the time this train left Nagda, then by a process of exhaustion we reach the conclusion that it must have been caused either by sparks from its own engine on the way to Bangrode after leaving Nagda, or by sparks from its own engine while engaged in shunting it at Bangrode, or afterwards when the whole train having been stabled, the engine stood for an hour and a half on the main line with steam up waiting for line clear to Rutlam. It is unlikely that any spark from the engine of train 62 up could have set a wagon so far back on the train as this one was, on fire, while the train was actually running. Such evidence as there is on the point, not very convincing evidence at best, points to the extreme improbability, verging on actual impossibility of a spark travelling the length of 42 wagons. The danger line used to be put at ten wagon lengths, but has been reduced in Mr. Pechey's time to seven wagon lengths from the engine. Wagons loaded with inflammable goods are not under the present running rules allowed nearer to the engine than this. But from the very fact that there is a rule on the subject it is clear that the controlling authorities of the defendant-company do recognize a real danger from sparks. Nor

can there be any serious doubt or controversy but that that danger is real and substantial.

But if any such rule is needed for running trains it is clear that some similar rules ought to be enforced to regulate shunting and the management of engines passing close to loaded trains. No such rules appear to exist. It is idle to protect goods against this very special risk by insisting upon their being drawn at a greater distance than say 150 feet from the engine if any number of other engines may pass and re-pass them at a distance of less than ten feet.

I have been referred to some English decisions upon the liability of a railway company for damage caused to adjacent properties, etc., by sparks from their engines. The case decided by Tyndall C. J. in 1846 shows that much the same question, I am now considering, was raised there and that the railway company relied on much the same defence. But most of these cases differ from the present case, in being actions brought by persons between whom and the defendant-railway company no privity of contract existed. And perhaps the defendant-company here would seek to distinguish even what principles can be got out of those cases by pointing to the words of sections 151 and 152 of the Contract Act and saying that that was the utmost the railway company had to prove in any case in which it was charged with loss, damage or destruction of goods as a bailee by a consignor. I think, however, these cases are not without value as showing the views consistently maintained by many eminent English Judges where it was merely a question of negligence or no negligence. True, these may have been actions on the case, and not, as here, founded in contract, but I cannot see what fair distinction can be drawn, between the principles upon which, in the former class of cases, there was said to be a case to go to the jury for the plaintiff, and cases like this, in which again, all that

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is to be decided is, whether in the whole ordering and management of the goods entrusted to them including in this, of course, the whole ordering and management of any other part of their machinery or running gear, from which any reasonable danger might be apprehended, the defendant-company had or had not exercised ordinary care and prudence. It might be argued that while in most, if not all, of those cases the Judges appear to have insisted with some rigour on the railway companies, taking the utmost possible care to prevent their engines causing any injury to the property of other people, all that our law requires is, that as between the railway company and their clients the railway company is only bound to take ordinary care. I confess I see no reason in principle why a company should be under a greater obligation towards those with whom it has entered into no contract than towards those with whom it has. And as I understand the terms of sections 151 and 152 of the Contract Act they would not exclude from the reasoning by which the final conclusion is to be reached just those considerations on which so many English Judges have repeatedly laid stress in determining whether a case was proper or not to be left to the Jury. I can hardly doubt that in the admitted facts here there is a case which in England would most certainly have been left to a Jury, nor do I entertain much doubt as to what the Jury's verdict would have been. The defendant-company has not offered any evidence to show that its servants have orders to handle their engines with special care when passing stationary loaded wagons, particularly at night. And yet surely it is no extraordinary measure of precaution if their engines ever throw out sparks and glowing cinders at all. This they admittedly do. It is plain, I think, that whatever danger is reasonably to be anticipated from such a cause is greatly increased at night, when, as a rule, there are

long intervals during which probably no supervision is exercised at all, and at any rate the same degree of vigilance is hardly to be expected as during the day time. A fire kindled in day time might be easily and early detected by a hundred casual eyes ; but during the small hours of the morning, unless the relatively few officers of the company on duty are wide awake and on the alert, it might go undetected until it had got such a hold as to be beyond all local means available to check it. And this is exactly what did occur in this case. For, however the fire originated, it is certain that it was not found out till it had made such headway that the staff at Bangrode found it impossible to cope with.

Some evidence was offered to show that the type of engine used to draw the 62 up is fitted with an internal arrangement—a brick arch and baffle plates—to reduce the quantity and size of sparks admitted to the funnel. But no one on behalf of the defendant-company can seriously contend that these, as well as all the rest of its engines, do not occasionally emit dangerous sparks and glowing embers. The defendant-company has adopted no spark arrester, although we are told that the G. I. P. uses one on all its engines. It is true that no spark arresters yet invented are, in the opinion of such experts as have been examined in this case, thoroughly satisfactory. But the fact that they are used on the G. I. P. and at least two Scotch lines of railway, suggests that such as they are they are better than nothing. But the real point lies, I think, not so much in the extent to which precautions of that kind are carried, for in no event it is contended that they are always efficient, but rather in the degree of caution shown by the defendant-company in the management of its engines, it being admitted and universally known that they do constitute a danger to inflammable goods when close to them, while passing and re-passing trains so loaded. And

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this appears to me in the admitted facts of this case to be the vulnerable point in the defence.

In the case to which I referred in an earlier part of this judgment, *Flannery v. Waterford and Limerick Railway Co.*⁽¹⁾, although that was an action for damages in respect of an injury caused to a passenger in which, of course, the onus would be largely on him, Palles C. B. laid it down that the accident must have been caused in one of three ways: (1) through some defect in the line; (2) through some defect in the carriage which ran off the line; (3) through some mismanagement of the engine and train while running. And it appears to me that *mutatis mutandis* that must always be very near the true principle to be applied in such a case as that with which I am dealing. The injury, if caused by an act of the Company at all (and I think I have shown that it must have been), must have been caused by some carelessness in loading the goods, or after they were loaded by some careless act of the Company's servants, either individually, or in the management of the rolling stock, and all that passed it while the train was *en route*, or being shunted. And as nobody knows what that act was, it seems to me that the defendant-company is placed, to say the least of it, in a very difficult, if not hopeless, position. But this case is not so difficult as some might be, because we have here admitted acts of the defendant-company, any one of which might have caused, and probably did cause, the fire, and those acts all appear to me to be of a kind which is not within the contemplation or meaning of sections 151 and 152 of the Contract Act. So far then as the origin of the fire has to be determined and the degree of negligence on that account for which the defendant-company is fairly liable determined, I think,

⁽¹⁾ (1877) Ir. R. 11 C. L. 30.

it is clear that the defendant-company by some act of its own caused the fire, and in the admitted facts the only reasonable conclusion is that that act was not such as an ordinary man would have done had the goods been in his own and under his complete control. In other words, in my opinion, the defendant-company is plainly responsible for the fire.

That being my conclusion on the first and most important point in the case, it is less necessary than it otherwise might have been to examine in detail another mass of evidence relating to the steps taken by the defendant-company's servants at Bangrode and Rutlam to quench the fire after it had been discovered. Here again the shaping of the case has plainly been influenced by the result of *Lakhichand's case*⁽¹⁾. But it is surely rather unreasonable to insist that because in that case it was found that the defendant-company was negligent and therefore to that extent liable, because it did not take very simple, easy, effective steps to put out the fire, that here the defendant-company must likewise be held liable because they did not do all sorts of extreme, impracticable things which having been done, as far as the evidence goes, the destruction now complained of could not have been averted. Briefly, the plaintiff complains that the fire was discovered at 3-30 A. M. but no message was sent to Rutlam for help till an hour or so had elapsed, and then the Rutlam authorities took no immediate steps to send water to Bangrode. Further, that it amounts to negligence on the part of the defendant-company not to have maintained at Rutlam an abundant supply of water together with fire extinguishing apparatus, and in a less degree that they did not do the same at Bangrode. The latter point is a question of law and does not turn on any evidence at all. For the facts are admitted. There was not enough water at

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Rutlam to supply the needs of that station, and there was no apparatus kept there for putting out fires on a large scale. It certainly seems surprising, considering the large amount of merchandise which must be constantly lying at Rutlam, considering too that it is an engine-changing station, and therefore in need of a large supply of water, that the two wells on which it depends locally are allowed to become practically useless, and that while depending for its engine-water upon a water train which runs sometimes once, sometimes twice a day to the little roadside watering station of Ghatla, three miles from Rutlam, it possesses no fire extinguishing apparatus at all. So that should a fire occur in the sidings there, involving loss to perhaps lacs worth of goods, the station authorities say that they would not be in a position to put such a fire out. Apparently the nearest station at which any proper fire extinguishing apparatus is to be had is Godhra, rather more than 115 miles from Bangrode. Of course it was out of the question to obtain that in time to be of any service in the present case of fire. But as I say all that depends upon admitted facts, and the point to which much evidence and argument has been addressed is simply this, whether when the Rutlam officials learnt of the fire between 4 and 5 A. M. they ought not at once to have sent the water tank train to fill up at Ghatla and go on to Bangrode? The railway staff have assigned a great many reasons why in existing circumstances this could not possibly have been done. All these reasons may be reduced to one, that doing what the plaintiff suggests would have so congested the traffic, already blocked and much behind time, that it could not reasonably be expected that the company would have faced all that inconvenience and loss for the sake of saving a single wagon load of the plaintiff's goods. If that were all that there is to be said on the point, I think it would be a

perfectly fair answer that the defendant-company then ought to pay the plaintiff the value of his goods. If to suit their own convenience and in their own interest, they did not adopt means which they might have adopted to save the plaintiff's goods, then it might be urged that they preferred their own interests to those of their bailor. But I think the real answer is much simpler. Mr. Storrer's evidence is emphatic. He declares that had the water tanks arrived all full, in the absence of force pumps and hoses, no good could have been done. The burning wagon might have been surrounded by water tanks and yet if there were no other means of utilising the water than throwing it out of hand buckets at the burning wagon, from a distance of fifteen feet, it would have been as impossible as before to get the fire under.

Once the fire had got hold of all the bales, this is probably true. For notwithstanding a fairly liberal supply of water from two engines, and finally the tank of drinking water which was detached from the up train at about 10 A. M., it is clear that the staff at Bangrode could not make the slightest impression on the fire. Now, had the Station Master at Rutlam used the utmost diligence, it is impossible, I think, that he could have sent the water train with all its tanks filled so as to reach Bangrode before 6-30 in the morning. And considering the accounts we have of the fire at 3-30 and the fact that it steadily increased in fury, and at no time was held in check, it may be concluded that by 6-30 it would have been entirely beyond the control of water, however abundant, which could only be pitched at it out of buckets from a considerable distance. Mr. Storrer says that when he reached Bangrode, say, at 8-30, the fire was raging so that he would not have cared to go within fifteen feet of it. He did, as a fact, get much nearer,

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but that because he was protected by the cab of the engine.

That being so, I think the whole of the evidence, about the water train and the question whether it might and ought to have been sent straight to Bangrode after filling up at Ghatla like most of the rest of the evidence in the case, may be entirely neglected. If, had the water train been sent, it could have given no effective help, then there was no use in sending it.

But it may be doubted whether the want of water and fire-quenching appliances at a station like Rutlam is not in itself evidence of negligence. Subsidiary to this is the consideration whether the local staff of Bangrode ought not, had they exercised proper care and vigilance, to have seen the fire long before 3-30. Once the shunting was over, say by 12-15, there can be little doubt that the station night staff took no further interest in the stabled train, and in all human probability they all went to sleep till the arrival of the 63 down at 3-30 woke them up. By that time the fire had broken out and was blazing fiercely. I think that the staff at Bangrode were right to isolate the wagon at once, and to try to get as many bales off it as possible while this was being done, but I should hesitate to say, did I think anything turned upon it, that they were equally right in not having at once applied for help to Rutlam instead of allowing a valuable hour to pass. But as there was no help available at Rutlam the point becomes immaterial.

I hope that I have not treated this part of the case too cavalierly. But let the evidence be handled how you will, the result must always be the same. It was physically possible to have despatched the water train, so that it might have reached Bangrode with all its tanks full between 6 and 7 A. M. But doing so would

have caused very serious and widespread dislocation of the traffic, and would, as far as I can judge, have done no good. Nothing really turns on the laboriously accumulated details concerning the actual hours at which down trains were to leave, and in fact did leave, Rutlam. Nor can I see that anything is gained from a consideration of so much of the evidence as may be related to hypothetical conditions. If both wells at Rutlam had been kept full to the brim, the station itself might not have needed the water brought in by the water train that morning at about 8-20. But the despatch of the water train would still have blocked the section and thrown the already congested traffic into worse confusion. It may be thought strange that when Bantleman, the Station Master of Rutlam, learnt of the fire and received a call for help at, say, 5 A. M. he did not at once go to Parr who appears to have had the disposition of the water train and confer with him about what had best be done. Parr was of course asleep at the time, and the evidence is that the water train could not have been made up for despatch without his concurrence and orders. But Bantleman evidently never thought of it. Indeed he did nothing except authorise the Bangrode staff to stop the up train which but for delays should have been at Bangrode a good deal earlier than it was, and take off the drinking tank to use in putting out the fire. Bantleman did not even mention the fire to Mr. Storrer who was leaving Rutlam between 8 and 9 A. M. for Bangrode.

But the explanation is that in all the circumstances of the case Bantleman judged that nothing effective could be done at Rutlam and so took what appeared to him to be the best course, leaving the section between Rutlam and Bangrode clear for scheduled trains in ordinary course (though all much behind time) and trusting to the arrival of the drinking water tank on the up train being in time to give the needed aid.

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In all the circumstances, both at Bangrode and Rutlam, I do not think that the staff of either station is to blame. The Bangrode men all appear to have worked hard and loyally with the limited means at their disposal. And the most that can be said against Rutlam is that it ought to have had, what it had not, an efficient fire-quenching apparatus, and an abundant supply of water. The consideration must always be a grave one, in regard to a station of such importance as Rutlam, and it will doubtless engage the attention of the defendant-company. It is one thing to say that a railway company cannot in reason be expected to sink all possible profits in the upkeep of efficient fire brigades and apparatus at every station, however insignificant, along the whole system, and quite another to say that they are under no obligation to provide such precautionary agency at great stations where goods must constantly accumulate and be exposed to the risk of fire. Had this fire occurred at Rutlam and lacs of rupees worth of damage been done, it may be doubted whether a Court would have listened favourably to a plea that the fire could not have been extinguished because the company does not maintain any staff to work, or apparatus to be worked, to put out fires. And indirectly of course the line of attack may be extended, as it has been in this case, the length of contending that had there been all that there ought to have been at Rutlam, effective use might have been made of it to extinguish the fire at Bangrode. But on that ground alone I should not have thought myself justified in holding the defendant-company liable. If they were not liable for the origin of the fire then I do not think they would be liable at all. As to what was done at Bangrode by the local staff a good deal of time was spent over the purely hypothetical question whether, had there been a force pump in the well,

water in sufficient quantity to cope with the fire when first detected might not have been available. The fact is that the water in the well was very low, and that there was no force pump. I think it is going too far in cases of this kind to put forward all sorts of hypothetical conditions under which loss might have been averted or minimized, and then charge the defendant-company for what loss was sustained, because those conditions did not exist. The trend of sparkage cases in England certainly encourages such attacks, but I think they ought to be kept within due bounds, in view of practicalities governing the management of great systems of railway in this country. Moreover, unless there had been pressure pumps and fire hoses as well as a force pump in the well, very little more could have been done to put out the fire than was done by the Bangrode staff. It is true that so long as men were able to be on the top of the wagon, and this was possible for some time after the fire was discovered, they might have dealt with it much more effectively had the supply of water at their command been much more copious than it was. Bringing buckets of water from a well at considerable distance, two at a time, to throw at the fire was of course utterly futile. And doubtless no more could have been done in the condition of the well, while much more might have been done had there been a force pump in it. On the other hand, it is unreasonable to expect the defendant-company to set up force pumps in every well at every road side station along the line and maintain them on the mere chance that some day a fire may occur there. Nor do I attach any importance to the want of any chemical preparations for extinguishing fires. I am not in a position to say whether, had there been chemical fire extinguishers, the fire might have been got under. I was referred to the late Aisgill disaster, and told that

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chemical fire extinguishers were used there with good results, but there is no evidence on record to prove this. Nor does the defendant-company use chemical fire extinguishers anywhere on its whole system. Having regard to the extreme proportional rarity of fires while goods are being transported by the defendant-company, I think that they are quite justified in contending that they are under no liability to incur a heavy, perhaps a ruinous, expense, to guard against these uncommon contingencies. But that only applies, of course, to the part of the case with which I am dealing. I cannot too often repeat that so far from being an answer on the first part of the case, the rarity or otherwise of fires affecting goods of this quality carried under ordinary conditions, rather points to the conclusion I have reached against the company. If fires were of constant daily occurrence then the method of transport would have to be reorganised; if they are of very rare occurrence, when they do occur they prove positively that something very unusual has happened. If the defendant-company say that engines passing and re-passing wagons full of pressed bales of cotton properly loaded and sheeted very seldom set them on fire, it must be because those engines do not as a rule emit dangerous sparks, or the conformation of the sheeting is such as seldom to afford lodgment to dangerous sparks when thrown upon it. None the less if one fire has been caused in that way it becomes clear that here is a real source of danger, easily preventable by taking very ordinary precautions, and the defendant-company is, in my opinion, bound to see that every reasonable precaution is invariably taken. In all the voluminous, and for the most part utterly useless, evidence got together in this case there is not a word, I believe, to show that the defendant-company either anticipate any danger from this cause or have issued orders of any

kind to guard against it. It may be a rare but it is a recurrent cause, a continuing danger to which no private owner of valuable goods would subject them if he could guard against it. To go no further than the very recent records of this Court, this is the third case I recollect within a very few years in which goods carried by a railway company have been destroyed by fire. In *Lakhichand's case*⁽¹⁾ the Court held that the company was not responsible for the origin of the fire which was left for ever unexplained. In the other case, which was not properly a case of goods being carried, but of grass lying at a station, the Courts found that the defendant-company was liable, as the fire was due to sparks thrown out by a passing engine. Now, if sparks thrown out by a passing engine can ignite grass lying on a platform or in a station yard, or plantations or bean stocks (as in two well known English cases) beside the line of railway, it is clear or ought to be clear that they may also ignite goods in wagons which are being drawn along the line. It is merely a question of distance, and the degree of protection afforded the goods by the method in which they are loaded and being carried. The distance where the danger lies in a passing engine can never be nearly as great as in the cases I have mentioned, and I have already shown that while sheeting the goods may afford some slight protection, may make it much less likely that a flying spark should find a comfortable and dangerous resting place, this alone is not sufficient to absolve the company from taking every precaution in the management of its engines, in addition. If it could be shown that the sheets put upon the wagons were completely fire-proof (in fact they are highly inflammable) then the defendant-company might reasonably say that having so covered the goods they were entitled to ignore any risk

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from flying sparks thrown out by passing engines. The facts, however, do not warrant any such position. The sheets are as likely to catch fire as the cotton, if a spark falls upon them and is not immediately blown off or extinguished; sparks are constantly being emitted within range of these sheeted wagons, and occasionally they do light and dwell on and ignite the sheeting. Even in the case of a covered wagon, as in *Lakhichand's case*⁽¹⁾, in all human probability the fire was caused, as conjectured by Batchelor J. by a spark from the engine falling through the narrow aperture in the roof of the carriage, and considering that, if I remember right, it was actually next the engine, I think that the defendant-company were, to say the least, unusually fortunate in having been able to convince the trial Judge and the learned Judges of Appeal, that the fire was due to no negligence on their part and that they had taken all the care which the law required them to take of the goods entrusted to them. This case is on an altogether different footing of fact and is much more difficult, because of the length of time and the distance covered and the incidents which happened between the commencement of the loading of the wagon at Ujjain, and the fire being discovered at Bangrode. I must not be thought to be calling in question in any way the authority of the decision of the Appeal Court in *Lakhichand's case*⁽¹⁾. I have indeed adopted the only rule approaching to a general rule of law laid down by their Lordships in that case, namely, that where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable. But further than that I cannot go and I do not see that I am bound to go by a single word in the judgment of the learned Chief Justice in that case. I am still to consider on the

⁽¹⁾ (1911) 37 Bom. 1.

evidence (if there be any relevant and material evidence) and the admitted facts whether the company has absolved itself within the meaning of section 72 of the Railways Act and sections 151 and 152 of the Contract Act. That must always be a question of fact in each case depending upon the facts of that and no other case, and here, in my opinion, the company has entirely failed to absolve itself of the responsibility cast upon it. I think it necessary to add these remarks because at the conclusion of his final address Mr. Binning said that whatever be my own view he apprehended that I should feel myself bound by the decision of the Court of Appeal. I certainly do. I have not consciously in the whole of this judgment gone a step beyond all that I can discover in the learned Chief Justice's judgment which could fairly be called a ruling of law binding on all the original Courts. I have permitted myself to comment on Batchelor J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Company v. Choutmull Doogar*⁽¹⁾ because it seemed to me absolutely essential that I should do so if I was to make myself clearly understood. For, I am as strongly of opinion as ever that that judgment, being of the highest authority and therefore binding upon all our Indian Courts, lays down a perfectly correct and easily intelligible principle not of law but of proof, which is quite a different thing. And I believe that my method of dealing with this case, while it leaves the rule laid down by Scott C. J. untouched, is strictly in accordance with what was done by their Lordships of the Privy Council in the case of *The Rivers Steam Navigation Company v. Choutmull Doogar*⁽¹⁾.

I trust that I have now made good what I have said more than once in the course of this judgment, that at least ninety per cent. of the evidence is utterly

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⁽¹⁾ (1898) 26 Cal. 398 : L. R. 26 I. A. 1.

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useless. It will be seen that, if I am right, every fact which needs to be considered, and forms part of the legitimate reasoning up to the main conclusion, is virtually admitted. And the same can be said with almost equal correctness of the second part of the case, which I have dealt with as shortly as I possibly could, in view of my first finding. It has, I am afraid, become a tradition of the bar founded on the far away dictum of some eminent Counsel, that the right way to conduct a case of any importance is to heap up all the bricks you possibly can within the limits stretched to their uttermost of the laws of evidence, on the off chance of making use of some of them in constructing the edifice of the final argument. Continuing that metaphor I may say the whole field and surrounding country, upon which have been built the tiny edifices of Counsel's final arguments to me, have been made a mass of useless bricks and debris. In my opinion that is not the best, but the worst way of conducting a case. I believe that had careful preparatory reasoning and reflection on both sides, with a full knowledge of what the evidence which they could call really was, been given to this case, before plunging into it, with an eye to the standard pattern I have previously mentioned, all the evidence that was necessary or ever likely to be referred to again could very easily have been laid before the Court in two or at most three days. But as both parties appeared as bent upon taking the somewhat tedious and profitless course that was taken, and no doubt the case will be carried to the Privy Council, I will say no more on that point. Perhaps I am wrong and the learned Counsel may prove to be right, but it will be seen that in this judgment, just as in the concluding addresses of Counsel on both sides to me, very little use indeed has been made, or (from my point of view) ever could pro-

fitably have been made, of a very great deal of the evidence, oral or documentary, which now forms the bulky record.

I find then that the railway company is liable for the origin of the fire and the entire resulting loss. I find that the defendant-company has entirely failed to show that in dealing with these goods it exercised all the care that an ordinary man would have exercised, had the goods been his own, and the whole machinery of transport under his own control. And I find that the defendant-company is not liable in respect of negligence or carelessness in dealing with the fire after it was discovered.

Attorneys for the plaintiffs: Messrs. *Captain and Vaidya*.

Attorneys for the defendants: Messrs. *Crawford, Brown & Co.*

Suit decreed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

KASHINATH PARSHARAM GADGIL AND OTHERS (ORIGINAL PETITIONERS),
APPELLANTS, *v.* GOURAVABAI AND ANOTHER (ORIGINAL OPPONENTS),
RESPONDENTS.*

Joint Hindu family—Ancestral property—Will—Probate—Payment of full probate duty.

In a case where there was admittedly a joint Hindu family consisting of a father and a minor son, the father made a will in effect bequeathing the whole property to his minor son. It was not disputed that the property covered by the will was joint family property. The executors contended that the deceased testator had no beneficial interest in any part of the property devised, and therefore they were exempted from the payment of any probate duty:—

* First Appeal No. 177 of 1913.

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Held, that where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will.

Collector of Kaira v. Chunilal⁽¹⁾, distinguished.

APPEAL against the decision of F. X. DeSouza District Judge of Sholapur, in miscellaneous application No. 239 of 1912 for probate.

The petitioners prayed for probate of the will of the deceased Rao Bahadur Malappa Basappa Warad. The will was executed at Bombay on the 12th January 1911 and the testator died at Sholapur on the 19th January 1911. The petitioners claimed exemption from the payment of the stamp duty leviable under section 191 clause (1) of the Court-Fees Act (VII of 1870) as amended by Act II of 1899. The petitioners' case was that as the testator and his minor son Chandbasappa *alias* Balasaheb were members of an undivided Hindu family, the estate was in the hands of the former "property held in trust not beneficially" and as such exempt from the payment of stamp duty under Annexure B to Schedule III to Act VII of 1870. They relied upon the decision in *Collector of Kaira v. Chunilal*⁽¹⁾.

The District Judge decided "that a stamp duty should be levied on a moiety of the estate situated within British India." In support of his decision the Judge made the following observations :—

There is however conflict of authority on this point in the reported decisions of the Bombay High Court. For while the decision just cited (*Collector of Kaira v. Chunilal*⁽¹⁾) supports the contention of the applicants there is the decision in *Collector of Ahmedabad v. Savchand*, I. L. R. 27 Bom., p. 140, which has a contrary effect. For, it lays down that the exemption from payment of stamp duty in respect of trust property only applies where probate or letters of administration having already been granted on which the Court-fee has been paid. In such case no further duty is payable

⁽¹⁾ (1904) 29 Bom. 161.

in respect of the property held by the deceased as trustee. But where no duty has been paid the exemption does not apply.

This conflict of authority has not been set at rest by a reference to a Full Bench. And it seems to me that it is open to Courts in this Presidency to follow one or other of these reported decisions according as it may seem to be more in consonance with general principles or with reported decisions of other Courts.

The point came on for consideration before a Full Bench of the Madras High Court *In the matter of Desu Manavala Chetty*, I. L. R. XXXIII Mad., p. 93. All the reported decisions of the several High Courts including *Collector of Kaira v. Chunilal*, I. L. R. XXIX Bom. 161 were there reviewed. It was pointed out that the decision in the last mentioned Bombay case, proceeded on a misapprehension of the *ratio decidendi* of the Calcutta case *In the goods of Pokurmull Augurwallah*, I. L. R. XXIII Cal. 980 on which it professes to be based. The tenure of undivided property by co-parceners in Bengal is regulated by the Dayabhaga ; whereas in Madras and Bombay it is regulated by the Mitakshara. Under the former system the co-parceners' undivided share is no doubt held as trust property not beneficiary or with general power to confer a beneficiary interest in it. On the other hand, under the latter system the undivided co-parcener has undoubtedly a beneficial interest in his undivided share ; for, he can claim partition or he can sell or mortgage it and apply the proceeds to any purpose he pleases. For these reasons the Full Bench held that the undivided co-parcener's share in the joint property at the time of his death held under the Mitakshara school of Hindu law could not claim exemption from the payment of stamp duty.

That case is on all fours with the present case.

The petitioners appealed.

Setalvad, with *Dinshaw of Payne & Co.*, for the appellants (petitioners) :—We submit that the property devised under the will is liable to exemption from payment of stamp duty under section 19D of the Court-Fees Act: *Collector of Kaira v. Chunilal*⁽¹⁾. This case, though apparently differing from the earlier one in *Collector of Ahmedabad v. Savchand*⁽²⁾, is now in agreement with it as shown in the judgment in the former case. The Calcutta Court also holds the same view: *In the goods of Pokurmull Augurwallah*⁽³⁾.

(1) (1904) 29 Bom. 161.

(2) (1902) 27 Bom. 140.

(3) (1896) 23 Cal. 980.

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In Calcutta where the Dayabhaga prevails, there is no doubt, the property vests in the father who has "a general power to confer beneficial interest in it to his sons". In Bombay, under the Mitakshara, each co-parcener only holds an inchoate and undetermined interest in the whole of the joint family estate, and no one of the co-parceners can, at any given time, say what his share in the estate would be. Therefore in the hands of each co-parcener it must be taken as being in trust not beneficially for the whole body of the co-parceners.

The theory of survivorship proceeds on the supposition that as soon as one co-parcener dies, the interest held by him *ipso facto* vests in the survivor. If the estate of the deceased co-parcener was beneficial and in his own right, the law would have required some act on his part to convey his interest in favour of the survivor. Hence we submit that on the theory of the Hindu Law the exemption clause is applicable to the present case.

Besides, from the history of the question as stated in *Collector of Kaira v. Chunilal*⁽¹⁾, it would appear that joint family estates among Hindus have been treated in this manner.

The necessity of a probate or letters of administration is felt owing to the demands of Banks and Registered Companies who refuse, under their rules, to transfer securities without them. The Bombay and Calcutta Courts have, therefore, put a liberal construction on the Statute to avoid the entailment of hardship in the case of large estates.

If the view we contend for be not acceptable, the order of the lower Court should be confirmed in so far as it requires the payment of stamp duty after exempting it on the share of the minor son in the hands of the father: *In the matter of Desu Manavala Chetty*⁽²⁾.

⁽¹⁾ (1904) 29 Bom. 161.

⁽²⁾ (1909) 33 Mad. 93.

The point is not definitely settled, therefore, a reference may be made to a Full Bench.

There is no difference between probate and letters of administration with regard to the payment of stamp duty as section 19D of the Court-Fees Act, which contains the exemption clause, applies to both.

D. G. Dalvi for respondent 2 (opponent 2).

BEAMAN, J.:—Owing to the position taken up by Banks and Limited liability Companies difficulties were experienced in cases in which joint Hindu families had invested part of their joint funds in the shares of such Banks and Companies. Shares had to stand in the name of one member of the family. He might or might not be the general manager. But, on his death, these portions of the joint family wealth could not be realized by the survivors without either getting probate of a will or letters of administration to the deceased member in whose name they stood. This has led in practice to a great deal of theoretical absurdity. Wills admittedly made by members of a joint Hindu family purporting to dispose, as of self-acquired property, of joint family property in favour of the survivors, have been solemnly propounded. Probate has seemingly been given as a matter of course. In this way the funds of the joint family invested in the shares of Companies have been obtained by the survivors. But the question early arose whether survivors thus seeking to obtain their own property under the fiction of a devise, should be called on to pay the full duty. The Court-Fees Act exempts from payment of duty any such part of the estate of the deceased testator or person to whom letters of administration are sought, as could be shown to have been held by him as bare trustee without himself having any beneficial interest therein or any power of beneficial disposition. In the class of cases I have

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described executors or survivors (calling themselves here next of kin) have contended, and on the whole, successfully, that the portion of joint family property, they are thus seeking to obtain, falls within the exemption. A bench of this High Court appears to have held in the case of *Collector of Kaira v. Chunilal*⁽¹⁾ that a member of a joint Hindu family had no beneficial interest in any part of the joint estate, and, therefore, that survivors propounding his will in order to be able to obtain shares standing in his name, were entitled to claim exemption on the ground that the deceased in his life-time had had no beneficial interest in the said shares, etc. This part of the judgment is not reasoned, but is professedly based on the decision *In the goods of Pokurmull Augurwallah*⁽²⁾ which Jenkins C. J. said he thought had been rightly decided. If that decision implies the general proposition (which it appears to imply) that no member of a joint Hindu family governed by the Mitakshara has any beneficial interest, during his life, in any part of the joint family property, we feel unable to assent to it. And if the decision does not imply that proposition, it appears to rest on no reason at all.

The case has come before us in this wise. There was admittedly a joint Hindu family consisting of a father and a minor son. The father made a will in effect bequeathing the whole property to his minor son. No one has disputed that the family was joint and that the property covered by the will was joint family property. On the authority of *Collector of Kaira v. Chunilal*⁽¹⁾ the executors require us to say that the deceased testator had no beneficial interest in any part of the property devised, and, therefore, that they are exempt from the payment of any duty. In our opinion this contention is unsustainable.

⁽¹⁾ (1904) 29 Bom. 161

⁽²⁾ (1896) 23 Cal. 980.

Those who propound a will and claim under it can hardly be heard to say that the testator had no powers of beneficial disposition. When *ex concessis*, the alleged testator was a member of a joint Hindu family and the whole property covered by the will was joint family property one would have thought that there was no legal foundation for the will, no need of probate. It is not a satisfactory answer, that in probate proceedings the Court has no further concern in the matter than to see whether in fact the will was made, and whether in all other respects it was a valid will. That is of course true, but it does not exhaust the question. If those seeking probate mean to include the whole of the property devised under the exemption clauses, it does become the duty of the Court to enquire so far, at least, as to satisfy itself that the conditions upon which exemption is granted have been fulfilled. Where, in the circumstances mentioned, the whole property is given to the sole survivor, who, again *ex concessis*, would take it in his own right, will or no will, the will propounded is on the face of it a mere nullity to which no effect could be given. Had it been necessitated owing to the testator having invested the joint family funds in the shares of Banks and other Companies, then it appears to us that however anomalous the position, which is thus reached, may be, it cannot be contended that since a will is necessary under which the nominal testator hands on this part of the joint family property to the survivor, he had not at the date of his death any beneficial interest in that property, and was never more than a bare trustee of it for the survivor or survivors. The reason for the exemption is clear. But neither that reason nor any consideration of policy, which occurs to us, would warrant its extension this length. Although the devisee under the will takes but what is his own, if he needs a will to get it we do not see why he should

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not pay the ordinary duty. He cannot be allowed to blow hot and cold, and say, in one breath, that a will was, and was not necessary. It is only by adopting the general proposition, which we find ourselves entirely unable to adopt, that no member of an undivided Hindu family has any beneficial interest in any part of the joint family property during his life-time, that the decision upon which the cross-appellants here rely could be supported. Were it merely a question of policy we should be disposed to take an exactly opposite line, and say that all Hindus taking by survivorship ought to pay duty on the value of the estates so taken, just as all other subjects not governed by the Hindu law of the joint family have to pay duty to the State on property devised or coming to them as heirs.

In our opinion the cross-appellants ought to pay duty on the whole estate covered by the will.

HAYWARD, J. :—The petitioners obtained probate of a will purporting to dispose of property held jointly between the testator and his minor son as members of a joint family under Hindu law. The petitioners, thereupon, claimed exemption from probate duty on the ground that the property was “property whereof the deceased was possessed as trustee” under section 19D and was not liable to Court-fee being “property held in trust not beneficially” within the meaning of Annexure B of Schedule III, Court-Fees Act, 1870, relying on the cases of *In the goods of Pokurmull Augurwallah*⁽¹⁾ and *Collector of Kaira v. Chunital*⁽²⁾.

The District Judge decided that the testator's undivided half share in the joint family property could not, but that the minor son's undivided half share in the property could, be regarded as “property held in trust not beneficially” within the meaning of Annexure B of

(1) (1896) 23 Cal. 980.

(2) (1904) 29 Bom. 161.

Schedule III of the Court-Fees Act, 1870, relying on the cases of *Collector of Ahmedabad v. Savchand*⁽¹⁾ and *In the matter of Desu Manavala Chetty*⁽²⁾.

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This Court has been asked, on first appeal, to decide that the whole of the joint family property was "property held in trust not beneficially" by the testator within the meaning of Annexure B of Schedule III of the Court-Fees Act, 1870, on the strength of the last four lines of the judgment in the case of *Collector of Kaira v. Chunilal*.⁽³⁾ It appears to me, however, with due deference that that judgment conflicts with the views of joint-family property theretofore accepted. It was said in *Appovier's case*⁽⁴⁾ that "According to [the true notion of an undivided family...no individual member...can predicate of the joint and undivided property, that he...has a certain definite share" and it was observed in the case of *Ramchandra v. Damodhar*⁽⁵⁾ that each "co-parcener is entitled to a joint benefit in every part of the undivided estate". It could not, therefore, be said that even the least part of the joint family property was held "in trust not beneficially" at his death by the testator as prescribed in Annexure B of Schedule III of the Court-Fees Act, 1870.

It appears to me what has to be looked at in such cases is the estate actually specified in the will and not the estate which could legally be disposed of by the will. It is an accepted principle that the legal effect of the will is not a matter for consideration. The factum of the will alone can be established by proceedings in probate. The estate here specified was the whole joint property. It would not be admissible to consider whether the testator had or had not power to dispose of such property by will. He purported to do so and

(1) (1902) 27 Bom. 140.

(3) (1904) 29 Bom. 161.

(2) (1909) 33 Mad. 93.

(4) (1866) 11 Moo. I. A. 75 at p. 89.

(5) (1895) 20 Bom. 467.

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those desiring to establish the factum of the will must pay the full duty leviable on such property in the necessary proceedings in probate. The case might, no doubt, have been different if the estate specified had been not the whole joint property but only a limited interest in the joint property—if, for instance, the estate specified had excluded the beneficial interests of the members of the family in the property and had strictly been limited to the legal right to parade as proprietor under such statutory provisions as sections 22 and 23 of the Presidency Banks Act, 1876, or sections 30 (2), 33 and clauses 21 and 22 of Table A of the 1st Schedule of the Companies Act, 1913. The possibility of such a case would appear from the remarks in the case of *Bank of Bombay v. Ambalal Sarabhai*⁽¹⁾. That would perhaps have been the appropriate manner of meeting the difficulties presented by such statutory provisions as those of the Presidency Banks and Companies Acts.

Before the said judgments were delivered, it was thought desirable by the Court to hear what the Revenue Authorities, who had not appealed against the decision of the lower Court, had to say on the point and they appeared before the Court through

Jardine (Acting Advocate-General), with *S. S. Patkar* (Government Pleader).

BEAMAN, J. :—When we dealt with this case we were under the impression that the view which commended itself to us was in direct conflict with the decision of a Division Bench in *Collector of Kaira v. Chunilal*⁽²⁾. Furthermore at that time the Revenue Authorities were not represented before us. We have, therefore, reconsidered the matter after hearing the Advocate-General for the Revenue. While adhering to the view we expressed in our former judgment, and dissenting

⁽¹⁾ (1900) 24 Bom. 350 at p. 359.

⁽²⁾ (1904) 29 Bom. 161.

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from what we conceived to be the principle underlying the decision in *Collector of Kaira v. Chunilal*⁽¹⁾ as well as in that of *In the goods of Pokurmull Augurwallah*⁽²⁾, which appears to have been approved by the Judges who decided *Chunilal's case*, we think that there is a sufficient ground of distinction, namely, that in *Chunilal's case* the application had been for letters of administration, here we are dealing with probate. Possibly different arguments may be drawn from those premises, but we are clearly of opinion that where the matter in question is probate, the parties claiming under the will cannot go behind its terms or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein, nor do we conceive that there is any difficulty created by the fact that we have ourselves been obliged to call upon the Advocate-General to protect the interests of the Revenue. When the cross-appeal was before us the Collector was not a party to it. The matter, therefore, so far as the only substantial counter-interest was concerned, was entirely *ex parte*, and it is the business of Courts to see that the revenue is not defrauded. Now, however, having called upon the Advocate-General and heard his representations in the matter which are in the nature of an appeal against the order made by the Court below, we are clearly of opinion that the executors must pay full probate duty upon the will, and we decree accordingly. Costs of Government and the executors to come out of the estate.

Full probate duty to be paid.

G. B. R.

(1) (1904) 29 Bom. 161.

(2) (1896) 23 Cal. 980.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

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October 5.

BALARAM VITHALCHAND GUJAR AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. MARUTI BIN DEVJI DUBAL AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 48—Civil Procedure Code (Act XIV of 1882), section 230—Limitation Act (IX of 1908), Article 182—Decree upon a compromise—Payment by instalments—Default—Execution—Minority of the legal representatives of the judgment-creditor—Step in aid of execution—Execution barred by the lapse of twelve years.

An instalment decree upon a compromise provided that upon default the judgment-creditor was entitled to possession of certain property. The decree was dated the 29th July 1884 and default in the payment of instalment was made in 1892. Thereupon the judgment-creditor applied for the execution of the decree. He died in 1898 and the execution proceedings were continued by his brother as his representative. In March 1902 the brother also died leaving minor sons. On the 27th June 1902 the guardian or the next friend of the minors applied to have the minors brought on the record as representing their father for continuing the execution proceedings. This application was rejected in September 1902 and the original application for execution which was presented by the judgment-creditor on default was also struck off. On the 1st September 1909 a fresh application to execute the original decree was presented by the minor sons of the judgment-creditor's said brother, one of the minors having in the meanwhile attained majority.

The application was met by the objection that as it was made after the expiration of twelve years from the date of the default mentioned in the consent decree sought to be executed, it was barred by section 48 of the Civil Procedure Code (Act V of 1908).

Held, that the fresh application was time-barred as being made twelve years after the date of the default. Article 182 of the Limitation Act (IX of 1908) showed that the fresh periods which could be obtained under the provisions of that article did not escape the provisions of section 48 of the Civil Procedure Code (Act V of 1908).

Section 48 of the Civil Procedure Code (Act V of 1908) is more extensive in its application than section 230 of the Code of 1882 and it is wide enough to cover the compromise decree of which execution was sought.

* Second Appeal No. 50 of 1913.

SECOND appeal against the decision of W. T. W. Baker, Acting District Judge of Satara, reversing the order of R. G. Gogte, Subordinate Judge of Karad, in an execution proceeding.

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On the 29th July 1884, one Naro bin Bhagavandas Gujar obtained a compromise decree which provided that the defendants should pay to Naro the sum of Rs. 600 by annual instalments of Rs. 50 each and in default of any instalment, the plaintiff should wait for four months and if the defendants failed to pay within that period of grace, the plaintiff was entitled to the possession of the property. Default in the payment of instalment having been made in the year 1892, Naro applied to execute the decree and to recover possession of the property. While the execution proceedings were pending Naro died in the year 1898 and the execution proceedings were continued by his brother Nihalchand as his representative. In March 1902, Nihalchand also died and his minor sons, Balaram and others, applied on the 27th June 1902 through their guardian for the substitution of their names in the record in lieu of their deceased father. This application was rejected in September 1902 and the original darkhast filed by Naro for the execution of the decree in the year 1892 was also struck off. Subsequently Balaram having attained majority, he and his brothers filed a fresh application for the execution of the decree on the 1st September 1909.

The first Court granted the application and directed that papers be sent to the Collector for the execution of the decree.

On appeal by the defendants the District Judge reversed the order and dismissed the application as time-barred. His reasons were as follows :—

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As to the respondents being minors they cannot claim the benefit of section 6 of the Limitation Act because time had begun to run against their father before his death in 1902.

This is a case not of initial disability but of subsequent disability : *cf. Jivraj v. Babaji*, VI Bombay L. R., p. 639.

The minors only became entitled to apply on the death of their father against whom time had already begun to run. Though the plea of minority has been raised in the application it is not mentioned in his order by the learned Subordinate Judge, presumably because he thought there was nothing in it.

The application for execution is time-barred. Their father died in 1902. The present application is 7 years from that date.

The applicants, representatives of the original plaintiff, preferred a second appeal.

Coyaji, with *P. D. Bhide*, for the appellants (representatives of the original plaintiff) :—Our fresh application for execution was in time. The decision in *Jivraj v. Babaji*⁽¹⁾ does not apply but that in *Lolit Mohun Misser v. Janoky Nath Roy*⁽²⁾ applies. Our disability to apply for execution on account of minority arose before the time had begun to run. The minors' father had made an application to execute the decree and pending that application he died. Then an application was made on behalf of the minors to bring them on the record and that application was rejected. Thus time had not begun to run at the time of the father's death. Moreover, the proceedings in execution were stayed till the decision of the Suit No. 333 of 1899, under section 335 of the Civil Procedure Code and the appeal in that suit was decided in 1909. Thus the Judge was not right in applying *Jivraj v. Babaji*⁽¹⁾. See *Lolit Mohun Misser v. Janoky Nath Roy*⁽²⁾ and *Mon Mohun Buksee v. Gunga Soondery Dabee*⁽³⁾.

⁽¹⁾ (1904) 29 Bom. 68.

⁽²⁾ (1893) 20 Cal. 714.

⁽³⁾ (1882) 9 Cal. 181.

The mere fact that the previous application to execute was made by the guardian of the minors would not disentitle them from taking advantage of their minority under the Limitation Act: *Mon Mohun Buksee v. Gunga Soondery Dabee*⁽¹⁾, *Anantharama Ayyan v. Karuppanan Kalingarayan*⁽²⁾, *Zamir Hasan v. Sundar*⁽³⁾, *Norendra Nath Pahari v. Bhupendra Narain Roy*⁽⁴⁾.

Section 230 of the Code of Civil Procedure, 1882, or section 48 of the Code of 1908, are not applicable to the case of minors: *Moro Sadashiv v. Visaji Raghunath*⁽⁵⁾.

Jayakar, with *S. R. Bakhle*, for the respondents (defendants):—The present application is a fresh application for execution of a decree which is more than twelve years old, it is, therefore, barred under section 48 of the Civil Procedure Code of 1908. That section is wider in scope than section 230 of the old Code of 1882. It covers the case of a mortgage decree and all other decrees except a decree for injunction. Thus the application being beyond twelve years is clearly time-barred. Article 182 of the Limitation Act clearly refers to section 48 of the Civil Procedure Code which is exhaustive and it mentions the only limitation contemplated in the section itself. Minority is not so excepted.

Coyaji, in reply:—The Ruling in *Moro Sadashiv v. Visaji Raghunath*⁽⁵⁾ shows that minority is a good defence even under section 230 of the Code of 1882. All the intervening applications were steps in aid and were continuous proceedings. The previous consent decree became merged in the decree passed under section 335 of the Civil Procedure Code.

(1) (1882) 9 Cal. 181.

(3) (1899) 22 All. 199.

(2) (1881) 4 Mad. 119.

(4) (1895) 23 Cal. 374.

(5) (1891) 16 Bom. 536.

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SCOTT, C. J. :—On the 29th of July 1884, a decree was passed in favour of one Naro upon a compromise, and according to its terms, certain instalments were payable, and upon default, as provided in the decree, the judgment-creditor was entitled to claim possession of a share or shares in certain property. Default having been made in 1892, the judgment-creditor became entitled to apply for possession and he, therefore, made an application for execution of the decree. In 1898 he died, and the execution proceedings were carried on thereafter by his brother as his representative. In March 1902, that brother died leaving the present appellants, his minor sons. On the 27th of June 1902, by their guardian or next friend, they applied to be brought on the record as representing their father for the purpose of continuing the execution proceedings, and in September 1902, their application was rejected, and the original application for execution which had been instituted by Naro was struck off. On the 1st of September 1909, a fresh application to execute the original decree was presented on behalf of the appellants, one of them having attained majority.

The objection is taken on behalf of the respondents that the application being a fresh application for execution, made after the expiration of twelve years from the date of the default mentioned in the consent decree, in respect of which the applicants sought execution, was barred by section 48 of the Code of Civil Procedure.

It is contended by the appellants that their case should succeed if they show that there was a fresh step in aid of execution made under the Indian Limitation Act of 1877, Article 179, or the present Indian Limitation Act, Article 182, which gave a fresh starting point to limitation, and that from that starting point time would not run against them until after they attained majority.

Unfortunately, however, for that argument, Article 182 of the Indian Limitation Act, which was in force at the time of the last application to execute the decree, shows that the fresh periods which could be obtained under the provisions of that Article do not escape the provisions of section 48 of the Civil Procedure Code, the words of Article 182 being "For the execution of a decree...of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908." Section 48 of the present Code is more extensive in its application than the previous section 230 of the Code of 1882, and it is wide enough to cover the compromise decree of which execution is sought in the present case. The fresh application, therefore, with which we are concerned being made more than twelve years from the date of the default, the appeal must fail. We affirm the decision of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

PRIVY COUNCIL.*

[On appeal from the High Court of Judicature at Bombay.]

KARMALI ABDULLA ALLARAKIA, PLAINTIFF *v.* VORA KARIMJI
JIWANJI AND OTHERS, DEFENDANTS.

Partnership—Agreement for joint venture in business—Contract Act (IX of 1872), sections 239, illustration (a), 249, 251, 252—Liability of co-adventurers against whom there is no document of debt binding on its face—Operations of buying and selling natural to a partnership, and for the partnership—Liability of both defendants on hundis drawn separately by each for payment of his own share of goods—Criterion as to transaction being or not being a partnership transaction.

* *Present* :—Lord Dunedin, Lord Shaw, Sir John Edge, and Mr. Ameer Ali,
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The respondents carrying on business in Mauritius and having separate offices in Bombay made an agreement for one year "for the purpose of doing business in partnership" in brown sugar to be shipped from Mauritius to Hongkong, and there disposed of on commission sale by the appellant, a Bombay merchant with an agency at Hongkong, the profits of the joint venture to be shared by the respondents equally. The shipments were to be made jointly in Mauritius, a half share by each of the respondents, each one drawing hundis against his own half share, and separate account sales of their respective shares to be rendered to them by the appellant who undertook to arrange for the necessary credit if the Banks in Mauritius would not discount the hundis drawn by the respondents; and an endorsement to that effect was made on the agreement and signed by the appellant. The terms of the agreement were carried out and shipments of sugar were made, but in respect of the hundis drawn by each respondent against his half share recourse was not had first to the Banks in Mauritius, but the hundis were at once drawn on and accepted by the appellant at Bombay. The shipments resulted in a loss. The first respondent had, when the hundis drawn by him became due, retired them, but the second respondent who had become insolvent, had not retired the hundis of which he was the drawer with the result that the appellant whose name was on the hundis as acceptor had to retire them. In a suit by the appellant against the respondents and the Official Assignee for the money advanced to pay the hundis, the first respondent alone defended it, his defence being that he had paid all the hundis drawn by him, and was not liable for those drawn by the second respondent.

Held (reversing the decision of the Court of Appeal in India) that the agreement created a "partnership" between the respondents within the definition in section 239 of the Contract Act (IX of 1872) which governed the case. But it was a partnership of a limited character, and consequently liability to be enforced against one partner, when there was no document of debt which on its face bound him, could only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

On the terms of the agreement the purchase of the sugar under it became a purchase for the partnership, and anyone who sold the sugar or advanced money by which the sugar was bought was crediting the partnership with goods or money. If either party in the case bought sugar and then re-sold it under the provision in the agreement for re-sale in Mauritius he could not refuse his co-adventurer a share of the profit he made. The joint adventure began not when the goods were shipped, but from the moment the sugar was bought. The appellant too was acquainted with the whole terms and conditions of the agreement, and knew therefore that by advance of credit he was helping the partnership in its purchase of sugar. That credit was not given in the precise way contemplated by the agreement; but that the respondents availed them-

selves of the appellant's credit appeared on the hundis themselves. When a drawer discounts an acceptance which is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit. Moreover on the evidence of the first respondent himself in cross-examination "the sugar purchased was all paid for by the hundis accepted by the appellant."

As to the criterion to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction, the cases of *Gouthwaite v. Duckworth*⁽¹⁾; *Saville v. Robertson*⁽²⁾; and *Heap v. Dobson*⁽³⁾ in the English Courts; and *Cunningham v. Kinnear*⁽⁴⁾; *British Linen Company v. Alexander*⁽⁵⁾; and *White v. McIntyre*⁽⁶⁾ in the Scottish Courts; and Bell's Commentaries on the Principles of Mercantile Jurisprudence, section 395, were referred to.

APPEAL 71 of 1913 from a decree (17th January 1910) of the High Court at Bombay in its Appellate Jurisdiction which reversed a decree (13th April 1909) of a Judge of the same Court in the exercise of its Original Civil Jurisdiction.

The suit giving rise to this appeal was brought by the appellant to recover Rs. 1,11,819-8-9, which he alleged to be due to him in respect of certain mercantile transactions between himself and Karimji Jiwanji the first defendant and Rashid Alladina and Company, the second defendant, the main question for determination being whether the first defendant was liable to the plaintiff in respect of hundis (bills of exchange) drawn upon the plaintiff by the second defendant's firm, now insolvent.

The first and second defendants who were separate firms carrying on business in Mauritius were in the habit of shipping sugar from Mauritius to China for sale there on commission. At the time of the transactions in suit Bombay was the principal place of business of the second defendant's firm, and a firm was opened

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(1) (1810) 12 East 421 at p. 426.

(2) (1792) 4 T. R. 720.

(3) (1863) 15 C. B. N. S. 460.

(4) (1765) 2 Pat. App. Cas. 114.

(5) (1853) 15 D. 277.

(6) (1841) 3 D. 334.

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in Bombay also by the first defendant during the course of the transactions.

The plaintiff was a merchant in Bombay and carrying on business in Hongkong through an agent there. He had had previous transactions in sugar with the second defendant whose firm was then in a good position and was allowed extensive credit : but the plaintiff had not had many dealings with the first defendant who had hitherto employed a firm of Talati as his commission agent in Hongkong. To avoid unnecessary competition the two defendant firms Vora Karimji Jiwanji, and Rashid Alladina and Company, in 1906 agreed to make a joint shipment of sugar to Hongkong which was to be disposed of there by the plaintiff as commission agent for both firms. The agreement purported to create a partnership between the two firms for one year in respect of these particular transactions only and was made with the privity and co-operation of the plaintiff who undertook that if the Banks in Mauritius would not discount the hundis to be drawn by the two firms against their consignments, he would arrange for the necessary credit, and an endorsement to that effect was made on the agreement and signed by the plaintiff. The agreement further provided in effect that the shipments should be made half and half by each of the defendant firms ; that each firm should draw against its own half share ; that separate account sales of their respective shares should be rendered to them by the plaintiff ; and that the profits of the joint venture should be divided between them equally.

The terms of the agreement are for the purposes of this report sufficiently stated in the judgment of the Judicial Committee.

In pursuance of the agreement sugar was purchased by the two firms in Mauritius, and shipments were made in two steamers to Hongkong. Of the sugar

shipped the larger quantity was purchased by the firm of Vora Khimji Jiwanji, but Rashid Alladina and Company took over their stipulated share of it, and paid Vora Khimji Jiwanji for it, the actual consignments being thus made half by each firm with separate bills of lading in the names of each.

Each of the defendant firms also drew hundis in their own names against their respective halves of the shipments as represented by the bills of lading. There was no special agreement between the parties as to these drawings of hundis, nor did the plaintiff allege that the first defendant at any time specifically agreed to be responsible for the hundis drawn by the second defendant.

The shipments were received and sold by the plaintiff in Hongkong, and separate account sales of their respective half shares thereof, with the name, at the head of each account, of the firm whose share it represented, were rendered by the plaintiff to the defendant firms from time to time until the insolvency of the second defendant which took place on or about 20th January 1908. The plaintiff being largely involved in the insolvency, thereafter sent instructions to his Hongkong firm to make out a fresh account of the whole of the shipments with the names of both firms at the head of it. An account so headed was duly made out in Hongkong and forwarded to the plaintiff in Bombay. It was produced at the hearing though apparently not put in evidence. It appeared from it that the plaintiff had another account prepared covering the whole of the shipments which he sent to the first defendant on 20th July 1908. The first defendant replied on 25th July 1908 that the account was entirely wrong, and referred the plaintiff to the previous account sales which comprised only the first defendant's share of the shipments. The plaintiff did not reply to

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that letter, but on 3rd September 1908 he filed the present suit in the High Court at Bombay against the two defendant firms, and the third defendant R. D. Sethna, the Official Assignee, as assignee of the effects of the firm of Alladina and Company, claiming the sum he alleged to be due on an account embracing the whole of the transactions between the parties.

The first defendant put in a defence denying any liability in respect of the hundis drawn by the second defendant, and disputing generally the correctness of the account. The second and third defendants did not file any defence, nor did they appear in the subsequent proceedings.

Issues were raised of which the nature of those material to this report appears in the judgment of Russell, J. before whom the suit came on. He said :—

“It is proved that prior to the agreement the plaintiff had been doing business for Rashid in sugar and other articles with China to a large extent. It is also proved that prior to the agreement Karimji had employed the wellknown firm of Talati as his agents in Hongkong . . . and there can be no doubt that the plaintiff was desirous of getting Karimji's business, and taking it away from Talati.”

And later on he continued as follows :—

“I agree with Mr. Davar in his argument for the plaintiff in reply that the most important point to be borne in mind in this case is the fact that this agreement was intended to be kept secret not only as regards Talati's people who had been connected in business with Karimji, as I have above said, but also with regard to other dealers in the market, and it must have been with that view that separate hundis were drawn and separate account sales were made out.

“I heard a very elaborate argument from the Advocate General to the effect that the condition implied by the endorsement not being performed, that endorsement did not come into operation. But bearing in mind the various documents which I have above referred to, the question is : Is para. 7 of the plaint established or not ? That says ‘ All the hundis aforesaid were so drawn in respect of the partnership aforesaid of the 1st and 2nd defendants, and the plaintiff paid and advanced the monies on the said hundis for and on account of the said partnership.’

"Looking at the case from a common sense businesslike point of view, the way I shall put it is this. Had it not been for the credit given by the plaintiff in Bombay under this agreement to the partnership, the partnership could not have entered into the transactions in sugar which they did. The credit given by the plaintiff was given to the partnership and not to the individual firms which composed it. That being so, in the event of one partner failing to perform his liabilities on the hundis drawn by himself, it becomes incumbent upon the other partner to perform those liabilities and I cannot believe that the plaintiff who is a business man ever intended to treat these two firms as separate and distinct for the purpose of giving them the credit he did."

And he concluded his judgment with the following findings on the material issues :—

"1. There was a partnership between 1st and 2nd defendants' firms as alleged in the plaint.

"2. In the events that happened, the plaintiff financed the said two firms jointly and gave them credit jointly.

"3. The hundis in this issue mentioned were drawn by the defendants' firms respectively in pursuance of the agreement that the partnership between them should be kept secret, but in the drawing of those hundis each of the defendants' firms pledged and intended to pledge the credit of the other.

"4. The plaintiff paid and advanced moneys on the hundis for and on account and for the credit of the said partnership.

"5. In the events that happened and in order to carry out the objects of the partnership, each firm had authority to pledge the credit of the other."

In the result a decree was made in favour of the plaintiff. From this decision the first defendant preferred an appeal in which the other two defendants were joined as respondents with the plaintiff. The appeal was heard by Sir Basil Scott C. J. and Batchelor J., who reversed the decision of Russell J., and decreed the appeal in favour of the first defendant. Their judgment was as follows :—

"The agreement is elaborately drawn for the purpose of keeping the interests of the two shippers distinct, from the outset up to the close of the transactions, except in so far as a combination between them was desirable for the purpose of securing joint shipments and the sale of their sugar in Hong-kong

"According to the decision of the learned Judge the events contemplated in the plaintiff's endorsement did not happen. It is, however, contended on

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behalf of the plaintiff that they did happen, and that the plaintiff in pursuance of the agreement contained in the endorsement opened a credit for the shippers in Mauritius which was availed of by them.

"There can be no doubt that a credit was opened as is evidenced by Exhibits C and C 1, but the first defendant's letter Exhibit 17 indicates that it was not availed of by him as he had no difficulty in making his own financial arrangements in Mauritius. He denies the story of the plaintiff that he accompanied the second defendant to the plaintiff and asked him to open a credit on the ground of the refusal of the Banks in Mauritius to discount their bills. It appears from what happened in connection with the two shipments from Mauritius that there was no refusal by the Banks in Mauritius to discount bills of exchange without a credit being opened by the plaintiff, for while as we have pointed out the first defendant had no difficulty in making his own financial arrangements with regard to the shipments in the 'Folsjo', it is not alleged that the plaintiff's credit was in any way availed of as acceptor in the drawing of the bills against the sugar in the 'Marie.' And as to this shipment, while the only credit alleged was opened with the Commercial Bank the bills were negotiated by the Bank of Mauritius. However even if a credit was availed of as contended by counsel for the plaintiff, it would not follow that either shipper was liable on the bills drawn by the other. This is a question which must be determined from an examination of the terms of the agreement which was the only agreement between the parties, and was formally accepted by the plaintiff as constituting the sole ground of his claim. From such examination we infer that the object of the arrangements contained in clause 4 was to enable each shipper to find funds for providing his quota, namely, one moiety of the assets of the venture, which were to be realised in Hongkong. But there is nothing in the agreement which could authorise either firm to pledge the other's credit. It may also be observed that the first defendant's name nowhere appears on the bills, which were drawn by the second defendant firm in their own name, and it is not suggested that that was the name of the combine.

"Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the plaintiff cannot succeed in charging the first defendant with liability on bills of the second defendant and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the plaintiff."

On this appeal,

De Gruyther K. C. and *Henry O'Hagan* for the appellant contended that the law of partnership in

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India was contained in the Contract Act (IX of 1872) which governed the present case ; and the decisions in the English Courts had no bearing upon and were not applicable to the questions raised on the appeal, or to the interpretation of the agreement of 25th July 1906. That agreement in effect created, it was submitted, a partnership between the two respondent firms ; and even though the events contemplated in the endorsement by the appellant on the agreement did not occur precisely as expected, both the respondent firms engaged in and proceeded with the transaction on the basis that both of them would be jointly liable on all the hundis drawn ; and on the understanding that they were accepted and paid by the appellant on the joint credit, and at the joint request of each of the respondent firms. Reference was made to section 239 of the Contract Act, illustration (a). It was a joint venture on the part of the respondents each of whom had in such a case authority to pledge the credit of the others in any way necessary in the usual course of such business ; and any liability so incurred by the second respondent firm was to be equally shared by the first respondent firm. Sections 249 and 251 of the Contract Act were referred to. The case turned, and the rights and obligations of the parties depended, entirely upon the construction of the agreement, which had not been annulled or amended ; see section 252 of the Contract Act. Reference was made on the construction of the Act to *Norendra Nath Sircar v. Kamalbasini Dasi*⁽¹⁾ and to *Bank of England v. Vagliano Brothers*⁽²⁾ referred to in that case.

Clauson K. C. and *G. R. Lowndes* for the first respondent contended that on the proper construction of the agreement between the respondent firms which

⁽¹⁾ (1896) 23 Cal. 563 at pp. 571, 572 : ⁽²⁾ [1891] A. C. 107.

L. R. 23 I. A. 18 at p. 26.

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had been made with the privity of the appellant, each of those firms was to be responsible only for their own share of the joint shipments. The agreement did not in law constitute a partnership between the two firms in the ordinary sense, but only a joint venture between them, and the appellant was cognizant of the limitation of the authority of each firm with respect to the transactions. It was in evidence that the word "majonoo" was used in respect of those transactions, which is used with regard to a joint venture; had it been a partnership, the word "bagidar" would have been employed in speaking of the parties to it. The hundis drawn by the second respondent firm were drawn in their own name, and for their own purposes; and there was no agreement by the first respondent to be responsible for the hundis drawn by the second respondent. Reference was made to *Heap v. Dobson*⁽¹⁾; *Gibson v. Lupton*⁽²⁾; and Lindley on partnership 8th Ed. 247 (7th Ed. 233).

De Gruyther K. C., in reply referred to *Gouthwaite v. Duckworth*⁽³⁾.

The judgment of their Lordships was delivered by

LORD DUNEDIN:—This action arises out of transactions connected with a venture in brown sugar entered into by the first and second respondents. The second respondent is now bankrupt and the third respondent is his official assignee: and neither of them defended the action or took part in the proceedings under appeal.

The first respondent, Karimji, and second respondent, Rashid, were both merchants carrying on business in Mauritius and had for some time been rivals in the sugar trade.

⁽¹⁾ (1863) 15 C. B. N. S. 460. ⁽²⁾ (1832) 9 Bing. 297 at p. 303.

⁽³⁾ (1810) 12 East. 421.

Rashid had all along also had a Bombay house, and Karim was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The appellant, Karmali, is a merchant carrying on business in Bombay and Hongkong.

Karim and Rashid resolved to have a joint speculation in brown sugar to be shipped from Mauritius to Hongkong. The terms of the arrangement they made between themselves were on 25th July 1906 embodied in a stamped agreement. The document is too long to quote, but may be summarised thus—It begins with a preamble that the parties “for the purpose of doing business in partnership in brown sugar from Mauritius to Hongkong agree to act as follows.” Then follow the terms. Purchases were to be made “jointly” at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is imposed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the Dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is after consultation to be chartered, and loaded with the purchased sugar and despatched to Hongkong. Invoices of the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time Rashid was to draw bills to the value of the sugar on his Bombay house, and Karim on his Bombay house when it came to be opened. But until that time came he was to draw bills on Karmali. If the banks at Mauritius refused to discount the bills on the Rashid or Karim house, the Bombay firms were to be informed by wire, in which case it was said that Karmali would come to the rescue by interposing credit according to arrangement made with him. On the ship arriving at Hongkong the

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arrangements as to sale of the sugar were to be carried through by the Bombay houses. Account sales were to come from Hongkong made up separately half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hongkong market being bad and there being an opportunity of a profit by reselling at Mauritius, this was to be done after permission got from Bombay; and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius banks refuse to discount the bills drawn by the Mauritius firms of the two defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by Karim, and about 4,000 by Rashid. Delivery orders were then given by each to each for half of the sugar purchased by him, and the sugar so divided on shipment was consigned to the Hongkong firm of the plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the banks to discount, recourse had to the assistance of the plaintiff; but they were at once drawn on and accepted by the plaintiff's firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped

upon the separate invoices of each, *i.e.*, about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hongkong, and was sold by the plaintiff to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realised not being sufficient to give a profit after payment of the price of the sugar, the freight, and other expenses.

The plaintiff accordingly raised this action, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two defendants had become due, and were payable to the banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the plaintiff, whose name was on these bills as acceptor, had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to the plaintiff. The bankrupt respondent Rashid and his official assignee did not oppose judgment being entered against them; but the solvent partner Karim opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any monies raised on bills to which he was no party.

The case depended before Russell J. in the High Court at Bombay, who after trial found in favour of the plaintiff. The material ground of his judgment may be effectively summarised by quoting two of his findings on the issues which he incorporated with his judgment which were as follows :—

“ I find (1) There was a partnership between first and second defendants' firms . . . (4) The plaintiff paid and advanced moneys on the hundis (bills) for and on account and for the credit of the said partnership.”

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The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows :—

“Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the plaintiff cannot succeed in charging the first defendant with liability on bills of the second defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the plaintiff.”

Their Lordships are of opinion that it is erroneous to treat the question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned trial Judge to himself was right. The case of the *In re Adanson Fibre Co.*⁽¹⁾ seems to have been much pressed on the Court by the learned counsel. But the very first sentence of the judgment of James L. J. shows that in that case the only question was whether in a winding up proof could be made on the bills alone ; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case. It is, however, a partnership of a limited character, and consequently liability to be enforced against one partner, when there is no document of debt which on its face binds him, can only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite v. Duckworth*⁽²⁾. In saying “the law,” it would perhaps be more accurate to say,

⁽¹⁾ (1874) L. R. 9 Ch. 635.⁽²⁾ (1810) 12 East 421 at p. 426.

a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powel, and Lord Ellenborough says this: "There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorised, he says, to purchase on the joint account of the three; yet if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them." He distinguishes the case of *Saville v. Robertson*⁽¹⁾ thus: "The case of *Saville v. Robertson*⁽¹⁾ does indeed approach very near to this; but the distinction between the cases is, that there each party bought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise." And Bayley J. after describing *Saville v. Robertson*⁽¹⁾ in the same way says: "But here as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing, *inter alia*, a case of *Cunningham v. Kinnear*⁽²⁾

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⁽¹⁾ (1792) 4 T. R. 720.

⁽²⁾ (1764) 2 Pat. App. Cas. 114.

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on the same lines as *Gouthwaite v. Duckworth*⁽¹⁾ which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, section 395, in words which their Lordships think accurately give the result of the cases both old and modern. "Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, &c., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution"

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall, and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap v. Dobson*⁽²⁾, while in the Scottish Courts may be taken as on the lines of *Gouthwaite's case* the case of *British Linen Co. v. Alexander*⁽³⁾ (where the facts are strikingly similar to the present case), and on the lines of *Saville* and *Heap's cases*, *White v. McIntyre*⁽⁴⁾.

Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a Judge, expressed some doubts as to whether the case of *Gouthwaite v. Duckworth*⁽¹⁾ could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other Judges; but is only an indication that a different view might have been taken of the facts of that particular case.

⁽¹⁾ (1810) 12 East 421 at p. 426.

⁽³⁾ (1853) 15 D. 277.

⁽²⁾ (1863) 15 C. B. N. S. 460.

⁽⁴⁾ (1841) 3 D. 334.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial Judge was correct. The considerations which lead them to that result are as follows.

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and anyone who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible resale in Mauritius itself. If either party in the case bought sugar, and then came to resell it in terms of that article, he could not refuse his co-adventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in *Saville v. Robertson*⁽¹⁾ or *Heap v. Dobson*⁽²⁾, that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. The learned Judges of the Court of Appeal are impressed with the view that the agreement is "elaborately drawn for the purpose of keeping the interests of the two shippers distinct... except in so far as a combination between them was desirable for the purpose of securing joint shipments and a sale of the sugar at Hongkong." Their Lordships cannot take this view. It ignores the fact that notwithstanding the separate shipment and consignment documents, the sugar was admittedly to be accounted for as partnership sugar. Supposing that the particular parcels consigned by one had in some way been deteriorated, either by perils of the sea, with-

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(1) (1792) 4 T. R. 720.

(2) (1863) 15 C. B. N. S. 460.

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out insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignment in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deplorably acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the plaintiff knew the whole terms and conditions of the agreement. He knew, therefore, he was helping by advance of credit the partnership in its purchase of sugar. The learned Appeal Judges say that the respondent Karim did not avail himself of the plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the 4th article of the agreement is true. But that they did not in fact avail themselves of the plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination, "For the purchase of all that sugar neither I nor Rashid paid a rupee; it was all paid for by hundis accepted by the plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the judgment of the trial Judge restored: the defendant Karim paying costs in the Courts below and before this Board.

Solicitors for the appellant : Messrs. *Ashurst, Morris, Crisp & Co.*

Solicitors for the first respondent : Messrs. *Latteys & Hart.*

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Appeal allowed.

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PRIVY COUNCIL.*

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AND

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29.

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Two appeals consolidated.

[On appeal from the High Court of Judicature at Bombay.]

Resumption—Resumption for “public purposes” by Government of land granted by East India Company—Scheme to erect dwelling houses at adequate rent for the accommodation of Government Officials in Bombay—Construction of lease and sanad—English decision under 43 Eliz., c. 2 as to exemption from rating—Notice of resumption addressed to one party and served on another—Waiver.

In these appeals the Judicial Committee held (affirming the decisions of the Courts in India) that the providing of housing accommodation for Government Officials by the erection of dwelling houses for their private residences at adequate rents, was a “public purpose” within the meaning of a lease of land from the East India Company given in 1854, and a Sanad or Government Permit of land granted in 1839 by the same Company, which made such lands (situate on Malabar Hill, Bombay) liable to resumption for “public purposes” upon certain terms as to notice and compensation. The scheme was one which their Lordships agreed with the Courts below would under the circumstances in evidence redound to public benefit by helping the Government to maintain the efficiency of its servants.

Held also (agreeing with the Courts below) that the English decisions which construed the words “public purposes” as used in the Statute 43 Eliz., c. 2

* *Present* :—Lord Dunedin, Lord Shaw and Mr. Ameer Ali.

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with reference to exemptions from rating afforded no help as to the proper construction to be put on the words in the contracts in suit.

The definition of a "public purpose" that "the phrase, whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned," approved by their Lordships of the Judicial Committee.

A notice which though addressed to one of the defendants (a testator who was dead) was served on one of his executors and trustees, also a defendant and accepted and acknowledged by his solicitors who corresponded on the basis of it with the Government as to the resumption, was held to be a valid notice, the irregularity having been thereby waived. *

APPEALS 139 and 140 of 1913 from two judgments and decrees (5th September 1911) of the High Court at Bombay, which affirmed on appeal two judgments and decrees (11th April 1910) of a Judge of the same Court sitting in the exercise of the ordinary original jurisdiction of the Court.

The suits giving rise to these two appeals were instituted in the name of the Secretary of State for India in Council (the respondent in the appeals) against the respective appellants to recover possession of land situate at Malabar Hill in the Island of Bombay, and for damages for the wrongful withholding of possession of such land by the appellants respectively.

In appeal 139 the land in suit had been on 18th April 1854 leased by the East India Company, in whom the land was then vested, to one Bachoobai, widow and executrix of Framji Cowasji Banaji deceased, for 99 years, renewable in perpetuity at a small annual rent, and the appellant Hamabai Framji Petit was at the date of the suit in possession thereof under the lease.

The lease contained a provision that "in case the Company their successors or assigns shall for any public purpose be at any time desirous to resume possession of the premises hereby granted or any part or parts

thereof, then it shall be lawful for the Company, their successors and assigns", to resume the land after giving six months' notice of their intention to do so, and on paying "for all buildings and improvements of which possession shall be taken according to such just and fair valuation as may be made by a committee to be appointed by Government for that purpose".

In appeal 140, a Sanad or Government Permit, had, on 6th April 1839, been issued to one George King, authorising him to occupy the land in suit, which was to be resumable by Government for "public purposes", subject to the same requirements as to notice, and payment of the value of buildings and improvements as in the other case. In that appeal (140) the suit was brought against Moosa Haji Hassam, Haji Ismail Good Mahomed (both since deceased) and the appellant Haji Sidick Haji Ebrahim, as the surviving executors and trustees of the last will and testament of one Haji Kurrim Mahomed Sulleman, deceased.

Notices of the intention of Government to resume the lands respectively in each case for public purposes were served on the defendants. The notice in appeal 140 while addressed to Haji Kurrim Mahomed Sulleman, who was then dead, was served on the defendant Moosa Haji Hassam, one of his executors and trustees, and was acknowledged by their solicitors who carried on the subsequent correspondence on their behalf with reference to the intended resumption. The defendants in both cases declined the offers of the Government, as to compensation, and refused to give up possession of the lands.

The suits were consequently instituted, that giving rise to Appeal 139 on 18th November 1909, and that in Appeal 140 on 28th November 1908, the "public purpose" for which the land was required was defined by the

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Government to be the "providing accommodation for Government officers".

Both sets of defendants denied in their written statements that "the providing of accommodation for Government officers" was a public purpose within the meaning of the lease and the sanad under which they respectively held possession of the lands in suit; and so far as these appeals are concerned that is the only question for determination material to this report.

The Court of First Instance (Beaman, J.) held on that question that the use and construction of the term "public purposes" in the decisions in England in rating cases were irrelevant and that "what was really intended by the Government of Bombay when it reserved to itself the right of resuming this land, 'for a public purpose', is a question which will have to be considered very much as *res integra*" and he continued:—

"Could this be called a private purpose and is not the true meaning of the words employed by Government, the meaning which Government itself intended that they should bear, that public purposes cover every step which Government takes as Government in the interests of the general public committed to its care? Where, as in the present case, it is not suggested that Government is actuated by any improper or dishonest motive, it might, I think, plausibly be argued that any designed action of Government as Government must by implication be deemed to be for a public purpose * * * * * The more I have reflected upon what means are available for answering the question what is a public purpose, the more I fall in doubt whether any question really can be made of the positive declaration of a responsible Government that it is taking any given step for a public purpose. Subsequent events might prove that the step has been miscalculated, and the aim of Government frustrated. But so long as Government asserts that what it is doing, is being done for a public purpose, and so long as in the very nature of things it cannot be acting in any private interest, it does appear to me extremely difficult to suggest any adequate reason for a Court to say, what the Government professes to do for a public purpose, it is not really doing for a public but for some non-public purpose. And if we turn to our own statutes, we find a confirmation of this view in the plenary powers conferred by the Land Acquisition Act upon the Government. Its bare declaration that the land is required for a public purpose is sufficient. So, in the present case, it seems to me that the Govern-

ment would have been fully within its powers and beyond the reach of challenge in the Courts had it simply announced that it required this land for a public purpose, without further specifying what that public purpose was. However, it has so announced that purpose and has endeavoured to satisfy the Court that it is a public purpose. Whether it would be so considered in England I do not know, but there are a hundred considerations which would be absent in England but come into forcible play in India. From the earliest days it has always been an accepted principle of Government that its principle officers should be provided with suitable accommodation. Where that suitable accommodation was not forthcoming, as in remote mofussil districts Government have invariably provided the Chief District Officers with suitable residence and at its own cost and a need for this was obvious. To take an extreme case, supposing it were necessary to post the administrative head of a district in a place where there was no residence available, suppose his services were indispensable to the surrounding peoples, would it not then be a public purpose—a purpose in which those usual surrounding peoples would have a vital interest—to provide house accommodation for that administrative officer? And the principle may well be extended though the conditions are altered to the cases of officers stationed in Bombay, for while there is there no dearth of houses, owing to the competition of and the great wealth which the native inhabitants have been enabled to amass under conditions of good Government maintained by those very officers, the rents demanded are so exorbitant that for all the use they are to those officers the houses might as well not exist at all. No parallel to this state of affairs can be found in England or indeed in any country where the governing and the governed are homogeneous. While they are not, I think there may be solid reasons for believing that the status in efficiency of Government itself might be seriously impaired so soon as its officials, owing to the shrinkage of their own salaries and the increase of wealth about them, far from being able to maintain a superior face into an inferior station to the wealthy classes of their fellow subjects. Considerations of this kind might appear so foreign to a purely English lawyer as hardly to be admissible in the judgment of the Court of law. Nevertheless they are considerations, which, no one conversant with the actual facts of Government in India would think of neglecting and I have no doubt that they are considerations very proper to be entertained by a responsible Government in this country, when it is making up its mind whether purpose of this kind can or cannot justly be called a public purpose. In my opinion, the technical defence upon which the defendant has relied, however ingenious it is, is too technical. It rests upon analogies which, if they exist at all, are too faint to be of practical importance. It is drawn from a system of case law in another country in which the conditions are wholly different, a system of case law, too, founded upon a particular statute with the strictly limited application to which no parallel at all exists in India. And failing that defence I can see no reason in principle why I should say that the purpose

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which the Government have in view, is not only nominally but truly and really a public purpose and a purpose of much public concern.

"For these reasons I must decree the plaintiff's suit with all costs : decree in terms of prayer A to the plaint."

An appeal by the defendants was heard by Chandavarkar and Batchelor JJ. who affirmed the decision of Beaman J.

The judgments of the Appellate High Court were as follows :—

"CHANDAVARKAR, J. :—I agree with Beaman J. from whose decree this appeal is preferred, that the English decisions, which were cited before him and which have also been cited before us in support of the appellant's contention as to the meaning of the term 'public purposes,' all turned upon its meaning with reference to the law of rating and cannot be safe guides in the present case, where different considerations have to be taken into account. Those were decisions upon the interpretation of a section in the Poor Relief Act, 1601 (43 Eliz. c. 2), according to which the test for determining whether a particular property is liable to the rate there contemplated is that of beneficial occupation. No doubt in determining what is beneficial occupation the English Courts have gone on to consider whether the occupation is for a public purpose, a term which does not occur in the section of the Statute. But the rule of law to be deduced from them as now prevailing is that there is no beneficial occupation for the purposes of rating, where property is occupied either by the Crown or by the servants of the Crown for Crown purposes, the occupation of the latter being in that event occupation of the Crown itself : *Mersey Docks v. Cameron*⁽¹⁾. And the reason of the rule is that the Crown, being not named in the Statute, is not bound by it. That even upon that test, the decisions are not easy to reconcile with one another or with any logical principle is apparent from the remarks of Sargent C. J. in the judgment of this Court in *The University of Bombay v. The Municipal Commissioner for the City of Bombay*⁽²⁾, of Lord Alverstone C. J. in the English case of *Wixon v. Thomas*⁽³⁾ and of Lord Bramwell in *Coomber v. Justices of Berks*⁽⁴⁾. The case of *Wixon v. Thomas*⁽³⁾ is instructive as showing the present tendency of the English Courts towards a more liberal interpretation of the term 'public purposes' even with reference to the law of rating.

(1) (1864) 11 H. L. C. 443 at pp. 503, 504. (3) [1911] 1 K. B. 43 at p. 52.

(2) (1891) 16 Bom. 217 at p. 228.

(4) (1883) 9 App. Cas. 61 at p. 79.

"In the present case that expression occurs in a perpetual lease granted by the East India Company in 1854 under whom the appellant claims, subject to the condition that the Company should be entitled to resume the land 'for any public purpose'. The case of Government, who claim under the Company, is that the cost of living, including house-rent, having increased in the town and island of Bombay, it has become necessary in the interests of the public administration and the efficiency of the public service to attract the ablest of their officials serving in the Mofussil to this city by providing suitable house accommodation to them on easier terms than those prevailing in respect of house-rent. For that purpose Government desire to resume this and other lands on the strength of the condition as to resumption above-mentioned. Whether it is a public purpose or not must depend on the question whether the proper housing of their officials by Government is for the public benefit or not. The 39th section of the Statute 21 and 22 Vict., c. 106, (1858) by section 1 of which the rule of the East India Company was terminated, enacted that 'all lands, &c., moneys, &c., and other real and personal estate' of the Company 'subject to the debts and liabilities affecting the same' and 'the benefit of all contracts, &c., and all rights to fines, penalties, and forfeitures, and all other emoluments, which the said Company shall be seized or possessed of, or entitled to, at the time of the commencement of the Act, except the capital stock of the Company and the dividend thereon, shall become vested in Her Majesty, to be applied and disposed of,' subject to the provisions of that Act, 'for the purposes of the Government of India.' All property belonging to the Company at the time the Act commenced and the benefit of all contracts entered into by the Company and enforceable by it became vested in the Crown for these latter purposes which in essence are public purposes. The Government of India exists for the benefit of His Majesty's Indian subjects and whatever conduces to that benefit must be a public purpose. That benefit can be secured primarily only by an efficient administration, which means an efficient service. Such service must depend on the efficiency of the men who are appointed to carry out the purposes of the Government of India, and who are, therefore, the servants of the Crown. If a state of things comes about which shows that in a City like Bombay the best men available from among these servants are reluctant to serve because of the increasing hardness of life in point of house accommodation and house rents, the Government is entitled to say that it raises a serious question as to the future of the public administration, and that the public benefit must suffer if the best officers available are compelled to serve as servants of the Crown in the City under such hard conditions. It is no reasonable answer to that consideration that the men are bound to serve wherever they are appointed, because Government never engaged to provide them with house accommodation on more or less easy terms. It is true Government are not bound in that respect, but the question is, not one of legal obligation but of general expediency and public

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benefit, and in this connection it is a material circumstance disclosed by the Civil List that it has been in this country customary for Government to provide house allowance to its officials, where that is, in its opinion, necessary in the interests of the public service. In substance there can be no difference between a house allowance and house accommodation.

"There is no definition of 'public purpose' in any of our legislative enactments to afford us a clue to the meaning of the term, save one in the Land Acquisition Act; but that is a partially inclusive not an exhaustive definition. Though the Legislature has not defined it for general purposes, it has given us a sufficient indication in the Land Acquisition Act of what it intended the term should convey, having regard to the constitution and objects of Government in and the special needs of this country. By clause (3) of section 6 of the Act the Legislature has directed that a declaration by Government that a certain land 'is needed for a public purpose' shall be 'conclusive evidence' that it is so needed. What could have been the object of the Legislature in making Government the sole judge of what is a public purpose under the Act but this, that having regard to the conditions in this country, the needs of sound administration and the public weal, it should not be hampered by any refined distinctions and legal subtleties but must be left to interpret the expression 'public purpose' in a wise and reasonably liberal spirit. Though, strictly speaking, this rule of the Legislature does not bind the Court in interpreting the expression where, as in the present case, it occurs in a contract, yet the Court may well take the Legislature as its guide in ascertaining the meaning of the expression. It was conceded by Mr. Setalvad for the appellant that if Government had sought to acquire this very land under the Land Acquisition Act, on the ground that it was needed for building a house for the residence of its servants, he could not have quarrelled with the declaration that the land was needed for a public purpose. In that case he could not have fairly argued that Government were endeavouring to acquire the land merely for a private benefit—the benefit to an individual or individuals—in the guise of a public purpose. If that is so, why should the Court treat this case on different considerations, if on the proved facts it finds that the purpose for which Government claim to resume the land involves, in its opinion, the element of public benefit and therefore of public purpose, understanding that expression to mean any object which secures the good of the public by securing the efficiency of those servants of the Crown on whose service the public good materially depends? The Court would under these circumstances defer to the declaration of Government on the analogy of the Land Acquisition Act unless the purpose stated was so flagrant as to involve, on no reasonable consideration, the element of public benefit.

"It was said, however, that this element of public purpose, such as it is, must be held to vanish in view of the fact that the Government intended to

charge rent to the official who would be housed in the building proposed to be erected on this land after resumption. This charging of the rent, it is urged, will bring pecuniary benefit to Government and the building will be occupied by the official who will pay the rent, not solely or exclusively in his capacity as a servant of the Crown. A similar argument was urged in this Court in *The University of Bombay v. The Municipal Commissioner for the City of Bombay*⁽¹⁾. The question there was whether The University of Bombay was an institution for a charitable purpose and therefore entitled to exemption from Municipal taxes. It was argued for the Municipality that the University was not an institution of that character and therefore not entitled to exemption, because it 'obtained an income from the fees paid by the students on the occasions of the Examinations held by the University' and that 'it derived a revenue from the occupation of the buildings.' In the judgment of this Court Sargent C. J. disposed of the argument by pointing out that 'the sole test' under the Bombay Municipal Act was whether the building of the University 'was exclusively occupied for a charitable purpose'; 'and the mere circumstance that small fees are required from the students before examining them which produce a revenue insufficient to defray the expenses of the University in conducting those examinations and keeping up the necessary establishment and which requires to be considerably supplemented by Government cannot, in our opinion, alter the essential character of the purpose for which the buildings are occupied.' So also, in the present case, the sole test, under the lease which we are construing, is, whether the building proposed to be erected on the land in dispute after resumption by Government is for 'any public purpose.' If the element of that purpose exists, the mere fact that Government will charge a moderate rent, not such rent as the letting value of the property will yield in the market, cannot alter the essential character of the building as one used for a public purpose. In this connection it is to be remarked as a circumstance of some importance that the expression used in the lease is not 'a public purpose' but 'any public purpose.' The word 'any' used to qualify the public purpose must have, in my opinion, been used designedly to make clear the intention of the lease that Government should be entitled to resume the land whenever any consideration or need of public benefit of any kind arises, though it may involve at the same time some private benefit.

"In arriving at this conclusion, I have not overlooked the meaning of the expression 'public purpose' given in *Moses v. Marsland*⁽²⁾. There, relying on the authority of *Josolyne v. Meeson*⁽³⁾, Bruce J. said that 'a place used for public purposes means, not a place used in the public interest but a place to which the public can demand admission or to which they are invited to come.

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The learned Judge would appear to have intended that as the colloquial and general meaning independently of its meaning in the particular Statute which he had to construe. Apart from the fact that the decision in *Moses v. Marsland*⁽¹⁾ proceeds on the construction of the Statute and on the principle of *ejusdem generis*, and that the observation of Bruce J. is so far an *obiter dictum*, a reference to *Josolyne v. Meeson*⁽²⁾ on which Bruce J. and Phillimore J. relied shows that in this latter case the meaning of the expression 'public purpose' went on its limited construction as used in an English Statute, and on the rule of *ejusdem generis*.

"On these grounds, in my opinion, the decree appealed from must be affirmed with costs."

"Our decision in Appeal No. 24 of 1910 governs also Appeal No. 25 of 1910. In this latter appeal two additional points were sought to be urged by Mr. Setalvad for the appellant at the hearing. The first was that there had been no legal notice of the intention of Government to resume the land, because the actual notice given had been addressed to the lessee after he had died and not to his executors. The executors, however, received the notice, and replied to it, and therefore such irregularity as there was was cured by waiver on their part. The second objection was that Government claimed in the plaint a strip of land belonging to the lessee which was not covered by the grant to him. The Advocate General for Government having explained the facts with reference to this point, Mr. Setalvad admitted that he had urged it under a misapprehension. The decree in this appeal too must be confirmed with costs."

BACHELOR, J. :—By a lease executed on the 18th April 1854 the East India Company demised the land in suit to the defendant's predecessor-in-title for a term of 99 years at a yearly rent of Rs. 11-2-3, the term being renewable indefinitely on certain prescribed conditions. But the lease contains a clause declaring 'that in case the said Company, their successors or assigns shall for any public purpose be at any time desirous to resume possession of the premises * * then and from thenceforth it shall be lawful to and for the said Company, their successors or assigns into and upon the said hereby demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again repossess and enjoy as in their first and former estate.'

"On the 16th October 1908 the defendant was served with a notice from the Collector of Bombay informing her that the plaintiff, the Secretary of State for India in Council, was desirous to resume possession of the land for a public purpose, and calling upon her to surrender possession on the 18th April 1909, the plaintiff undertaking to pay for all buildings and improvements on the land on a fair valuation. The defendant, however, declined to surrender

⁽¹⁾ [1901] 1 K. B. 668.

⁽²⁾ (1885) 53 L. T. 319.

possession, and this suit is brought to eject her. Mr. Justice Beaman, before whom the suit was tried, decreed in favour of the plaintiff, and against that decree the defendant brings the present appeal.

"The only question raised is whether the purpose of Government in seeking to resume this land is a 'public purpose' within the meaning of that clause in the lease which I have cited; if it is a public purpose then admittedly the suit must be decreed.

"Now upon the question of fact as to what is the purpose of Government there is no dispute. In paragraph 5 of the plaint it is stated compendiously as being 'the purpose of providing accommodation for Government officers.' Stated more fully, the case for the plaintiff is this; owing to certain economic conditions of life in Bombay, notably owing to the heavy house rents there prevailing, Government are embarrassed in their selection of officers to fill public appointments in this City; instead of having the entire *cadre* of their Officers as the field of choice, they are driven to restrict their selection to a smaller group of officers, who, as bachelors or as having private means or otherwise, are enabled to meet the additional expenses incurred by living in Bombay. The purpose now actuating Government is to remove this embarrassment by resuming the land in suit and other land held on similar tenure, and by building on it houses to be leased to their resident officers at rents bearing a reasonable proportion to the officers' salaries.

"The accuracy of this description of the purpose of Government has not been challenged before us, and sufficient proof of it will be found in the evidence of Mr. W. Cameron, the Secretary to Government in the Public Works Department. That gentleman speaking on behalf of Government, says, 'Our selection is much cramped in existing circumstances because good men whom I would like to recommend, are not able to serve here. I have always to consider whether the officer can afford to serve in Bombay. House rent, say Rs. 150 in Poona, would be Rs. 400 in Bombay; and Poona is next (*i.e.*, the next most expensive place) after Bombay.' He clinches this evidence by an instance from his own personal experience, narrating that in 1900 he had to decline an offer to serve in Bombay as he could not afford the extra expense.

"On the question of fact, then, I need not say more. The purpose of Government in attempting to resume this land is as I have described it. The question is: is that a 'public purpose' within the meaning of the lease? I am of opinion that it is, but before explaining the grounds of my opinion it will be convenient to consider certain English decisions which the defendant claims as authorities for the view that the purpose of Government, being as I have described it, is not a 'public purpose.' The decisions referred to are *Gambier v. Overseers of Lydford*⁽¹⁾; *Martin v. Assessment Committee of West*

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Derby⁽¹⁾; *Showers v. Assessment Committee of Chelmsford Union*⁽²⁾; and *Jones v. Mersey Docks*⁽³⁾. I have set out these cases *en bloc* because I do not think they demand separate consideration here. I will accept Mr. Setalvad's position that, despite the actual decision in *Jones's case*, the learned Judges' discussions of the phrase 'public purposes' in the earlier cases remain unaffected as indications of the meaning which that phrase was construed to bear; but even so I cannot bring myself to understand how those discussions can possibly assist the Court in the very different controversy which has now to be determined. Indeed the very reference to these cases is. I cannot but think, an illustration of a practice which in *Quinn v. Leatham*⁽⁴⁾ elicited from the Earl of Halsbury L. C. the following protests:—'There are,' said His Lordship, 'two observations . . . which I wish to make, and one is . . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.' In the case before us I cannot see that there is even an appearance of logical connection between the 'public purposes' of the cases decided under a particular English rating statute and the 'public purposes' of the lease of land in Bombay in 1854. For the only 'public purposes' with which the English Courts were concerned were purposes sufficient to negative such beneficial occupation as would under the statute of Elizabeth attract the liability to rating. So, the only question decided in those cases was the question whether a particular occupation was rateable, and the cases cannot properly be quoted as authority for more than was decided. I could understand the relevance of an appeal to those decisions if the contemplated houses being supposed to be built and the English Statute being supposed to be law in Bombay, the question were whether the houses would be exempt or rateable; and I am prepared to grant that, on these suppositions, the houses would be rateable. Neither that, however, nor anything like it is, I conceive, the question now before the Court. And if the point need further elaboration, I would adopt the Advocate General's illustrative instance. Under the lease in suit Government, I suppose, could certainly resume the land for the purpose of building, say, a public school, or a Fire Brigade Station; yet both of these institutions would be rateable under the English statute. It would seem to follow, therefore, that the 'public purposes' of the Indian lease are wider than the 'public purposes' considered in the English cases in contrast with beneficial occupation. I would add that, in seeking to apply the decisions

(1) (1883) 11 Q. B. D. 145.

(3) (1864) 11 H. L. C. 443.

(2) [1891] 1 Q. B. 339.

(4) [1901] A. C. 495 at p. 506.

of the English Courts in such a case as this, there is some danger of overlooking an essential feature of difference, I mean the difference in the position of a Government in England from the position of an Indian Government with its more direct and constant relations with the general community, and its necessarily more active interference in the affairs of the people. On the whole, then, I am unable to recognise that the English decisions quoted can be referred to as guides for the interpretation of the words of the present lease.

"If that is so and if this lease is to be construed from its own language, then I cannot doubt that Beaman, J.'s decision is right. General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that in my opinion, the phrase, whatever else it may mean, must include a purpose, that is an object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. That it is so concerned here must, I think, be plain to any one familiar with the relations between an Indian Government and its subjects, the innumerable points at which those relations are close and direct, and the multifariousness of the duties for whose discharge the community looks to Government and the officers of Government. Here, therefore, it is especially necessary in the interests of the public that Government should be able to appoint to posts in the Capital City those officials who, they are satisfied, are most competent to fill such appointments. It is directly to the gain and advantage of the public that, on an appointment falling vacant, the enquiry by Government should be, who is most capable of filling the vacancy, and not, who can best afford the expense of filling it.

"The validity of these considerations is denied by Mr. Setalvad, who replies that they would justify the resumption of the land for the purpose, say, of building a Gymkhana for Government officials in order to preserve their health and efficiency; yet such a purpose, he contends, would certainly not be a public purpose within the lease. To that I can only answer, first, that hypothetical cases are best postponed for decision until they have ceased to be hypothetical; and, secondly, that, assuming the Gymkhana would not be a public purpose, there is surely a rather obvious distinction between a place of recreation and a house to live in, the former may be conducive to good work, but the latter is a condition precedent to all work.

"The same result is reached if we consider that the provision of house accommodation does not, for our present purposes, materially differ from the grant of a Local allowance to cover the heavy charges on account of rent in Bombay. Yet I cannot see how it could be contended that such an allowance, if made, was not made for a public purpose. Again, on the proved and admitted facts, we have it that there are not now in Bombay enough suitable houses for the number of officials whom it is necessary to post here. Unsuit-

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able houses may exist, but for the purposes of the argument, they are equivalent to no houses, a proposition which I merely state in passing since it has not been suggested before us that the officers of Government should be relegated to such houses as could at present be found for their occupation. The case, therefore, is as if Government were proposing to build for officers necessarily stationed in Bombay houses where no houses existed before, and it seems to me certain that that would be a public purpose. It would be as much a public purpose as the purpose or object of the officers' appointments.

"For these reasons I am of opinion that the decree under appeal is right, and I agree that the appeal should be dismissed with costs.

"I agree also with what my learned colleague has said in decision of the related appeal. The point as to notice is clearly without substance and the other point as to the strip of land was abandoned. No other point was taken before us."

On these appeals

De Gruyther K. C. and Henry A. Mc.Cardie, for the appellant in Appeal 139.

De Gruyther K. C. and Kenworthy Brown, for the appellants in Appeal 140.

Sir H. Erle Richards K. C. and G. R. Lowndes, for the respondents.

For the appellants it was contended that providing house accommodation for Government officials was not a "public purpose" for which the respondent was entitled to obtain resumption of the lands sued for. The Courts below had put a wrong construction on the terms of the lease and sanad under which the appellants held the lands, and had not applied to their interpretation the proper rules of law. A purpose for the benefit of only a certain class of individuals was not a public purpose. The land the respondent was desirous of resuming was not to be used for the good of, nor would it be of any advantage to, the general public. There would be no occupation of the buildings for the purpose of the public business, nor would the officers of Government, to whom they were let, use them in the discharge of their public duties. There

would be a mere residential and domestic occupation for a rental to be paid to Government, and there was nothing to prevent the occupants from subletting. It was only in a remote and indirect manner that the proposed use of the land would benefit the public or be of any advantage to the public service, such as securing more efficient administration : and there was no evidence that such benefit or advantage would accrue from it or constitute the purpose a public purpose. There was moreover no proof that there was any need for the provision of houses for Government officials in Bombay, or that the present accommodation was insufficient or unsuitable for the Government officials. The provisions of the Land Acquisition Act (I of 1894) were wrongly applied by the Courts in India to the appellants' lease and sanad and thereby a construction was put upon them which their terms did not bear, namely, that the mere declaration of Government that the land was wanted for a public purpose was sufficient without more to entitle them to resume the land. The Act was not applicable to the interpretation of the documents in suit. Reference was made to the Land Acquisition Act (I of 1894), section 6, sub-section (3) ; and *Shastri Ramchandra v. Ahmedabad Municipality*⁽¹⁾. In Appeal 140 it was contended that the notice of resumption was not valid.

The respondents were not called upon.

1914 November 18th :—The judgment of their Lordships was delivered by

LORD DUNEDIN :—The same general point is raised in these two appeals.

The first appellant was lessee under the Government as successors of the East India Company under a lease of date 18th April 1854, which lease contained a power

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⁽¹⁾ (1900) 24 Bom. 600.

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of resumption in favour of the lessor if "the Company, their successors or assigns, shall, for any public purpose, be at any time desirous to resume possession of the premises granted" . . . upon certain terms as to notice and compensation.

The second appellants are holders of land under Government in virtue of a sanad originally granted to one George King on 6th April 1839, by the said East India Company, which declares the ground given in occupation is to be "at any time resumable by Government for public purposes" upon certain terms as to notice and compensation.

The Government gave notice in both cases to resume for a public purpose. On being challenged as to what that public purpose was, they explained that they wished for the ground in order to erect dwelling houses, which they could offer to Government officials at adequate rents for their private residence. Suitable houses for Government servants are not easily obtainable in Bombay; but it is not said that obtaining quarters of some kind is an impossibility. The whole question, therefore, is: is such a scheme a "public purpose" within meaning of the contracts contained in the lease and the sanad?

The learned Judge of First Instance in the High Court of Judicature at Bombay and the Appeal Court of the same Court have both held that it is. The learned Judges in the Courts below have, in deference to citations made before them, elaborately considered many of the decisions which construed the words "public purposes," as used in the Statute of Elizabeth with reference to exemptions from rating. In the end, however, they came to the conclusion that those decisions afforded no help as to the proper construction to be put on the words of these contracts; and in that conclusion their Lordships unhesitatingly agree.

The argument of the appellants is really rested upon the view that there cannot be a "public purpose" in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor J. in the first case, when he says :—

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease ; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Prima facie* the Government are good judges of that. They are not absolute judges. They cannot say : "*Sic volo sic jubeo*," but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment.

Their Lordships are therefore of opinion that on the general point the view of the Courts below was right.

A special point was taken in the second case as to sufficiency of notice. It is enough to say that the view of the Courts below was clearly right in this matter.

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Their Lordships will humbly advise His Majesty to dismiss the appeals, but there will be no costs to either party before this Board.

Solicitors for the appellant in Appeal 139 : Messrs.
T. L. Wilson & Co.

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Solicitors for the appellants in Appeal 140 : Messrs.
Latteys and Hart.

Solicitor for respondent in both appeals : *Solicitor,
India Office.*

Appeals dismissed.

J. V. W.

PRIVY COUNCIL.*

P. C.^o

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JEHANGIR DADABHOY (DEFENDANTS 1 AND 2) v. KAIKHUSRU KAVASHA (PLAINTIFF) AND OTHERS (DEFENDANTS 3 AND 4).

October 29.

[On appeal from the High Court of Judicature at Bombay.]

November 2,
26.

Will—Construction of will of Parsi—Devise to two sons in equal shares—Gift over to son of elder son, if he should have one—Failure of male issue to elder son—Provision for adopted son on failure of natural son—Adoption after testator's death and according to Parsi custom three days after death of father—Gift over to grandson on attaining majority—Elder son surviving testator—Succession Act (X of 1865), section 111.

A Parsi having two sons P. and J. made a will in 1866 in the following terms :—Clause 2 stated "The said two sons are proprietors half and half alike and in equal (shares) of my whole estate, outstandings, debts, title and interest, and both the heirs living together are duly to enjoy the balance which may remain after the Sarkar's assessment. In this my testamentary writing I the testator have appointed my two sons as (my) heirs." Clause 5 said that "P. the elder son being in a confused state of mind," the management of the estate was entrusted to the younger son J. "by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole estate with equanimity with my elder son P. in such a way as not to injure his (P.'s) rights. At present my elder son P. has no male issue of his body. (He) has only a

* *Present* :—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

daughter. Therefore if my elder son P. gets a male issue half of the estate is to be made over to him on his attaining his full age." Clause 11, after prohibiting any alienation of the property, continued, "If my son P. does not get a son, J. is to give away his son as P.'s *palak* (or adopted son). All the clauses of this will are applicable to the said adopted son. If a son be born of the body of P. he (shall) on attaining (his) full age be the owner of a half share of the whole of the immoveable and moveable estate belonging to me . . . all the clauses written in this will are applicable to the said son of (his body)."

The testator died on 21st August 1866 leaving his two sons, and J. entered upon the management of the estate having obtained probate of the will in 1867. P. was twice married but had no son. He died in 1897 leaving a widow and other representatives his heirs according to the Parsi Intestate Succession Act (XXI of 1865) who brought a suit to ascertain the rights and interests of the parties in the estate and for partition, basing their claim on P.'s right as the owner of one-half of the estate from the date of the testator's death. The defendants were J. and his son B. who was five years old at the death of the testator, and who it was alleged had been, though not in the testator's life-time, adopted as the *palak* son of P., and, as the defendants contended, succeeded under the will to the half share of the estate which P. had enjoyed though on the terms of the will it had never vested in P.

Held, (affirming the decisions of the Courts below) that the proper interpretation of the will in the events that had happened was that the date of distribution was the death of the testator, at which date one-half of the estate vested in P. The destination over to a son who should take upon attaining majority would be using language appropriate to the events of the death of P. during the life-time of the testator, and of his having left a son—the situation also being provided for of that son not having at that time attained majority. But when P. himself survived the testator there were no words in the will sufficient to cut down the right of P. to one-half the estate, to a tenancy for life, or a less period therein according to the appellant's contention. On the contrary the words employed appeared suitable to the case of the entire estate being, on the testator's death, divided into two portions, and of each portion then becoming the absolute property of one of the two sons of the testator.

The same result was arrived at by the application of section 111 of the Indian Succession Act which their Lordships agreed with the Courts below was applicable.

APPEAL 78 of 1913 from a judgment and decree (9th December 1910) which affirmed a judgment and decree (2nd April 1910) of the Court of the Subordinate Judge of Thana.

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The principal questions for determination on this appeal related to the construction and effect of a will dated 8th August 1866 by one Dadabhoy Byramji.

The facts and the material clauses of the will are sufficiently stated in the judgment of the High Court (Batchelor and Rao, JJ.) now on appeal, which was as follows :—

“ One Dadabhoy Byramji, a Parsi inhabitant of Tarapur, died on 21st August 1866 after having made a will in the Gujarathi language on 8th August 1866. He left two sons Pallonji and Jehangirji (defendant No. 1). Pallonji, the elder son, was a person of weak intellect and unable to look after his affairs. Jehangirji entered upon the management of the whole estate immediately after his father's death. He obtained probate of his will in 1867. His son Byramji (defendant 2) was about 5 years old at the time of the testator's death.

“ Pallonji died in 1897 leaving a widow Cooverbai (defendant 3), his son-in-law Kavasha husband of a predeceased daughter (defendant 4), and his daughter's son Kaikhusrui (plaintiff). Pallonji was twice married but had no son born to him. Pallonji was living with his brother Jehangirji up to his death.

“ On 7th March 1906 the plaintiff as the constituted attorney of Cooverbai applied for letters of administration to Pallonji's estate : On 22nd December 1909 letters of administration were granted to the plaintiff.

“ On 6th April 1909 the plaintiff filed the present suit, praying (*inter alia*) for the following reliefs (a) that defendant 1 be ordered to account for his management of the estates of Dadabhoy and Pallonji ; (b) that the rights and interests of plaintiff and defendants 3 and 4 in the estates aforesaid be ascertained, declared and awarded to them ; and (c) that partition be made of the properties of Pallonji, and defendant 1 amongst the parties entitled thereto in accordance with their respective interests.

“ Defendants 1 and 2 contended (*inter alia*) (a) that under the will of Dadabhoy the moiety of the property bequeathed to Pallonji passed on his death to defendant 2 as the *palak putra* of Pallonji ; (b) that defendant 1 did not manage the property as a trustee for Pallonji and (c) that the suit was barred by limitation.

“ The Subordinate Judge held that upon the true construction of Dadabhoy's will, his sons Pallonji and Jehangirji took an absolute interest in equal shares in the residuary estate ; that Jehangirji managed Pallonji's half share in the estate as a trustee for Pallonji ; that Byramji (defendant 2) did not take any

interest under Dadabhoy's will ; that the suit was in time ; and that Pallonji's estate passed on his death to his heirs—plaintiff and defendants 3 and 4, their shares being one-ninth, two-thirds, and two-ninths respectively.

"The Subordinate Judge passed a preliminary decree appointing a commissioner to take an account of the property of Dadabhoy, which came into defendant 1's possession since Dadabhoy's death, and report as to what fund, moveable as well as immoveable, was now available for distribution among the heirs of Pallonji. Against this decree defendants 1 and 2 appeal to this Court.

"It is contended on behalf of those defendants that under Dadabhoy's will, Pallonji did not take an absolute interest in the moiety of the estate given to him ; that he had only a right to enjoy the income of the moiety till his natural born son attained the age of majority ; and that on the happening of that event, the son would be entitled to take possession of the moiety. It was further contended that as no son was born to Pallonji, Byramji (defendant 2) was given as a *palak* son to Pallonji, and as such was entitled to the whole of Pallonji's half share in the same way, and on the same conditions as his natural born son, if he had any. Lastly, it was contended that defendant 1 had not been in management of Pallonji's share as an express trustee, and that the suit was therefore governed by Article 120 and not by section 10 of the Limitation Act XV of 1877. At an early stage of the argument we expressed our opinion that the suit was not barred by limitation, as Jehangirji was not only an executor but also a trustee in whom a moiety of the estate was vested in express trust for the benefit of Pallonji, and that the case fell within the purview of section 10 of the Limitation Act.

"The case entirely turns on the construction of Dadabhoy's will. The material portions of the will bearing on the questions at issue are clauses 2, 3, 5, 8 and 11.

"The first question to be determined is, what interest does Pallonji take in the property bequeathed to him ?

"Clause 2 provides—'the name of the elder son is Pallonji, the name of the younger son is Jehangirji. The said two sons are proprietors half and half alike and in equal shares of my whole estate, outstandings, debts, title and interest.' Under this clause it is perfectly clear that Pallonji took an absolute estate in one moiety of the testator's property. Section 82 of the Indian Succession Act provides—'Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.' This is also the rule laid down in the case of *Ganendra Mohan Tagore v. Jaiindra Mohan Tagore*⁽¹⁾ where their Lordships of the Privy Council observe that

(1) (1872) L. R. I. A. Sup. Vol. 47 at p. 65 : 9 Ben. L. R. 377 at p. 395 : 18 W. R. 359 at p. 365.

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'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law (as under the present state of law it does by will in England) an estate of inheritance.' Applying this principle to the present case there is no doubt whatever that Pallonji took an absolute interest in the property given to him by clause 2 of the will. Is there anything in the rest of the will to control or restrict this absolute interest? Clause 3 provides—'none of my heirs have power in any way to mortgage or sell or give in gift or in charity, etc., or to dispose of in any other way whatsoever the immoveable and moveable estate belonging to me, the testator, which there is or may be according to (my) books and according to the partition, etc., the half share of the Inam Khoti Watan village of Velgam appertaining to my share. Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the Government assessment.' Clause 8 further provides :—'If any of my heirs after my death carry on any trade or business of any nature whatsoever, and if a loss or deficiency occur therein, the risk on account thereof (shall) be on the heir (so) trading. The claims or demands of the creditors in regard to the same shall not avail at all against my estate. The whole of my estate is given by me for the maintenance of my heirs and their descendants.'

"These clauses undoubtedly place restrictions on the powers of enjoyment, alienation, and disposal of the property given to both Pallonji and Jehangirji. But such restrictions being repugnant to the absolute gift already made under clause 2 of the will are invalid and inoperative and opposed to law. In *Ashutosh Dutt v. Doorga Churn Chatterjee*⁽¹⁾, the testatrix by her will provided *inter alia* as follows : 'This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale.' The Privy Council held that these restrictions on alienation 'being inconsistent with the interest given were wholly, beyond her power, and must be rejected as having no operation.' Mr. Shah contends that reading clause 5 with clauses 3 and 8 it was the intention of the testator not to confer an absolute estate on Pallonji, but to give him only a right to enjoy the income of one half of the estate subject to the control and management of his younger brother Jehangirji. It is urged that he must live with his brother and enjoy the income but has no right to separate possession, enjoyment, and partition of his share. In support of this contention, Mr. Shah relies on the words in clause 3—'Both the heirs are to take care of the said estate and look after it and both the heirs living together are duly to enjoy the balance which may remain after payment of the Sarkar's assessment' and in clause 8—'The whole of my estate is given by me, the testator, for the maintenance of my heirs and

⁽¹⁾ (1879) 5 Cal. 438 at p. 442 : L. R. 6 I. A. 182 at p. 186.

their descendants'; in clauses 5 'Therefore he (Jehangirji) is to carry on according to my testamentary (writing) the whole management by his true and pure integrity, and both the heirs are equally to enjoy half and half alike the whole estate with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights'. It appears to me that these directions about the mode of enjoyment of the property given to Pallonji and Jehangirji are inconsistent with the absolute gift to both, and therefore void under section 125 of the Indian Succession Act: see also *Haliburton v. The Administrator-General of Bengal*⁽¹⁾: *Lala Ramjewan Lal v. Dal Koer*⁽²⁾: and *Raikishori Dasi v. Debendranath Sircar*⁽³⁾.

"It was next argued for the defendants 1 and 2 that whatever interest Pallonji took under the will, it was liable to be defeated when a son was born to him and attained the age of majority, or failing the natural born son when a *palak* son was given to him. In either of these contingencies, it was urged, a moiety of the estate would pass either to the natural born son, or to the *palak* son. Reliance was placed on the following passages in the will:—'Therefore if my elder son gets male issue, half of the estate is to be made over to him on his attaining full age', (clause 5). 'If a son be born of the body of Pallonji, he (shall) on his attaining his full age be the owner of a half share in the whole of the immoveable and moveable estate belonging to me. My heir (and) vakil (or executor) Jehangirji or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his) body', (clause 11). There can be no doubt that the effect of these passages is to make the absolute gift to Pallonji defeasible in the event of his having a son, and that son attaining majority. But as that event did not occur, the absolute gift became indefeasible. That being the case, Pallonji's half share of the estate would pass on his death to his heirs and next-of-kin.

"But it is urged that Byramji was given as a *palak* son to Pallonji on the third day after his death and that as such he is entitled under clause 11 of the will to the same rights as the natural born son. It is contended that the *palak* stands on the same footing as the natural born son, and that the executory devise in favour of Byramji took effect on Pallonji's death. In support of his contention Mr. Shah relies on the following passage—'If my son Pallonji does not get a son, my son Jehangirji is to give his son as Pallonji's *palak*. All the clauses of the will are applicable to the said *palak* son.' In this passage there is no doubt a direction to Jehangirji to make his son a *palak* son to Pallonji. But there is no express gift either to Byramji or to the *palak* son in this

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(1) (1894) 21 Cal. 488.

(2) (1897) 24 Cal. 406.

(3) (1887) 15 Cal. 409; L. R. 15 I. A. 37.

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passage or in any other part of the will. A gift is sought to be spelt out of the words, 'All the clauses of the will are applicable to the said *palak* son.' These words are in the first place too vague to be susceptible of the interpretation put upon them. The same words are used in respect of the natural born son. It is difficult to say with precision what the testator really meant by these words. But an explanation is offered by Mr. Taraporewala for the respondents, who has argued the case with great care and ability, that these words refer to the restrictive clauses 3 and 8. It appears from the will read as a whole that the dominant idea in the testator's mind was that his estate should go down to his descendants unimpaired and undiminished and free from all claims on the part of his relatives or strangers to the family. For this purpose he places every possible restriction on the power of alienation, and enjoyment of the property, and these restrictions apply not only to his sons and heirs but also to Pallonji's wife, daughter, or any other person claiming through Pallonji. It is therefore reasonable to suppose that he intended that Pallonji's son, whether natural born or *palak* should be placed under the same restrictions. But whatever be the precise meaning of these words, it is difficult to infer from them that any gift was made to the *palak* son. It may be that the testator intended to make a gift to the *palak* son, but he has not said so. 'The question is,' as Lord Wensleydale observes in *Bullock v. Downes*⁽¹⁾ 'not what the testator meant, but what is the meaning of the words used.' This is the established rule of construction. There are no words to be found in the will to indicate a gift to the *palak* son. Byramji's name is not even mentioned. I am therefore of opinion that there is no legacy given to Byramji either as a *persona designata* or as a *palak* son.

"Even assuming that there was an executory bequest to Byramji as a *palak* son, the bequest would be void under section 111 of the Indian Succession Act. The bequest to the *palak* son is to take effect on the happening of an uncertain event, namely, if no son was born to Pallonji. No time is mentioned in the will for the occurrence of this event. The bequest would therefore be void unless such event happened before the period of the payment or distribution of the fund bequeathed. So long as Pallonji was alive there was a possibility of his having male issue, and until his death without male issue there was no chance of Byramji becoming a *palak* son. It follows therefore that the event on the happening of which the legacy to Byramji was to take effect did not occur before the testator's death which would ordinarily be the period of payment or distribution of the fund bequeathed. But Mr. Shah relies on *Edwards v. Edwards*⁽²⁾ and *O'Mahoney v. Burdett*⁽³⁾ and contends that the period of distribution in the present case would be either the time when the natural born

⁽¹⁾ (1860) 9 H. L. C. 1 at p. 24.⁽²⁾ (1852) 15 Beav. 357.⁽³⁾ (1874) L. R. 7 H. L. 388.

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son of Pallonji came of age, or the death of Pallonji when Byramji was made his *palak* son. But it is to be observed that according to the second rule laid down in *Edwards v. Edwards*⁽¹⁾ relating to executory bequests such as we are considering in the present case, and afterwards affirmed by the House of Lords in *O' Mahoney v. Burdett*⁽²⁾, the event on which the gift over is to take effect may happen at any time either before or after the testator's death. This rule is not adopted by the Indian Legislature in section 111 of the Succession Act according to which the contingency must occur before the period of distribution. Mr. Shah contends that in the present case the period of distribution should be taken to be the time of Pallonji's death; he says that though Byramji was in fact given as *palak* on the 3rd day after Pallonji's death, his rights relate back to the date of Pallonji's death. No authority is cited in support of this proposition and none can be found. I am of opinion that in this case the period of distribution should be taken to be the death of the testator. See *Norendra Nath Sircar v. Kamalbasini Dasi*⁽³⁾, where their Lordships of the Privy Council observe—"To search and sift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life seems almost absurd. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments. The Indian Legislature may well have thought it better in certain cases to exclude all controversy by positive enactment. At any rate in regard to contingent or executory bequests the Succession Act, 1865, has laid down a hard and fast rule, which must be applied, wherever it is applicable, without speculating on the intention of the testator."

"I therefore hold that even assuming that there was a gift to Byramji as a *palak* son, it would be void under section 111 of the Indian Succession Act.

"This being the case, I am of opinion that on the proper construction of the will of Dadabhoy Byramji, his son Pallonji took an absolute interest in the moiety of the residuary estate and that on his death it passed to his legal heirs under the Parsi Succession Act.

"I would therefore confirm the decree of the Subordinate Judge and dismiss the appeal with costs."

On this appeal,

De Gruyther K. C. and Horace Miller, for the appellants
contended that according to the true interpretation of

⁽¹⁾ (1852) 15 Beav. 357.

⁽²⁾ (1874) L. R. 7 H. L. 388.

⁽³⁾ (1896) 23 Cal. 563 at p. 572 : L. R. 23 I. A. 18 at p. 26.

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the will Pallonji did not take an absolute interest under its provisions, but only an interest that was defeasible; and that in the events which had happened the interest taken by him passed on his death to the second appellant Byramji, who had been adopted as Pallonji's *palak*. The Courts in India were wrong in holding that Byramji did not acquire any interest under the will. The intention of the testator was the very usual and natural one that the property should be kept in his family; and that object he endeavoured to secure by leaving it to a natural son of Pallonji's if there should be one, and if there was not one by making a gift to a son to be adopted to Pallonji who would take the place of a natural son. If the property went to the respondents that would be, it was submitted, contrary to the intention of the testator, and not in fact under the will but according to the Parsi Succession Act (XXI of 1865) applicable to intestate estates. As to the construction of wills of Indians, reference was made to *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*⁽¹⁾; *Chunilal Parvatisankar v. Bai Samrath*⁽²⁾; and *Narasimha v. Parthasarathy*⁽³⁾. [LORD DUNEDIN:—Your difficulty is that there is no clear gift in the will to the *palak* son.] By clause 11 “if Pallonji does not get a son, his brother Jehangirji is to give his son as a *palak* (adopted son).” As Pallonji left no natural son, Byramji was given as a *palak* son, and he took, it was submitted, just as the natural son would have taken. The Courts in India relied upon section 111 of the Succession Act (X of 1865). That section was taken from one of the rules laid down in *Edwards v. Edwards*⁽⁴⁾, a rule which was not approved of in *O'Mah-*

(1) (1856) 6 Moo. I. A. 393 at p. 411.

(2) (1914) 38 Bom. 399.

(3) (1913) 37 Mad. 199 at p. 221 : L. R. 41 I. A. 51 at pp. 70, 71.

(4) (1852) 15 Beav. 357 at p. 361.

oney v. *Burdett*⁽¹⁾, and on the authority of the last-named case it was contended that the gift over was to take place on the death of Pallonji "at any time," whether before or after the death of the testator; and the recent case of *Chunilal Parvatishankar v. Bai Samrath*⁽²⁾ was referred to, as adopting that construction. [LORD DUNEDIN.—How do you get rid of *Norendra Nath Sircar v. Kamalbasini Dasi*⁽³⁾, which is against you?] In the present case to decide in accordance with that decision would be contrary to the testator's intention which must be considered; and see Jarman on Wills, 6th Ed. 452, and 2209, paragraph 7. It was also contended that the suit so far as the moveable property was concerned was barred by Article 120 of Schedule II of the Limitation Act (XV of 1877); and *Mahomed Riasat Ali v. Hasin Banu*⁽⁴⁾ was referred to.

Sir R. Finlay K. C. and *G. R. Lowndes*, for the respondents called on as to whether under the will there was a gift over to the second appellant, the *palak* son of Pallonji, contended that there was not, and even if there were, such a gift over would be void under section 111 of the Succession Act. That section applied to all property whether immoveable or moveable, and to all contingent bequests whether substituted or not; see *Norendra Nath Sircar v. Kamalbasini Dasi*⁽⁵⁾ per Lord Macnaghten. Reference was made to *Sreemutty Soorjeemonee Dossee v. Denobundoo Mullick*⁽⁶⁾; and Mayne's Hindu Law, 7th Ed., 557, paragraph 420. What was in the mind of the testator, as to an adopted son, was an adoption in the life time of Pallonji if he had

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(1) (1874) L. R. 7 H. L. 388.

(2) (1914) 38 Bom. 399.

(3) (1896) 23 Cal. 563 : L. R. 23

I. A. 18.

(4) (1893) 21 Cal. 157 : L. R. 20
I. A. 155.(5) (1896) 23 Cal. 563 at p. 572 :
L. R. 23 I. A. 18 at p. 27.

(6) (1862) 9 Moo. I. A. 123 at p. 135.

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no son ; such an adoption was alleged but not proved : that was the whole of the appellants' case as to adoption in their written statement. In the events that had happened Pallonji's share in the estate of the testator passed on Pallonji's death to the respondents as his heirs.

De Gruyther K. C. replied.

1914 November 26th :—The judgment of their Lordships was delivered by

LORD SHAW :—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on 8th August 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the "estate" are these :—

"The said two sons are proprietors, half and half alike, and in equal (shares), of my whole 'estate,' outstandings, debts, title, and interest. . . . Both the heirs are to take care of the said 'estate' and look after it, and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar's assessment. . . . In this my testamentary writing, I, the testator, have appointed my two sons as (my) heirs."

The will then states that Pallonji, the elder, a man then of about thirty-nine years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate"

"by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole 'estate' with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) rights."

Upto this point in the will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these :—

“ At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the ‘ estate ’ is to be made over to him, on his attaining (his) full age.”

And it may be proper that the 11th clause of the will should be quoted in full. It reads thus :—

“ I, the testator, have in the second clause of this will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father’s house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable ‘ estate ’ etc. appertaining to the half share during the lifetime of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter, or any (other) person (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji’s *palak* (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he (shall) on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable ‘ estate ’ belonging to me. My heir (and) *vakil* (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body).”

The material facts of the case are that the testator having executed this will on 8th August 1866 died within a fortnight thereafter, *viz.*, on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the will indicates. Jehangirji entered upon the management of the whole estate, having obtained probate of the will in 1867. This state of matters lasted for thirty years, *viz.*, till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who

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are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account, for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one-half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, *viz.*, that it is alleged, that on 3rd December 1886 Pallonji adopted, as his *palak*, Byramji his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as *palak*, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English phraseology, the terms of the will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as *palak* of his uncle. The points among others discussed were (1) whether such a *palak* could ever take under the will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a *palak* taking could ever be purified, *viz.*, that Pallonji should die without a son, and (2) the peculiar point as to the office of a *palak* to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, *viz.*, whether the will contained in itself sufficient words of grant or gift to the *palak*.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary

for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's will one-half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached twenty-one during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son, who should take upon attaining twenty-one years of age, would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the lifetime of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under twenty-one.

But when the father Pallonji himself survived the testator, it does not appear to their Lordships that there are any words in the will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a will, in their Lordships' opinion the same result is precisely reached by the application of section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in

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the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants will pay the costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the first and second respondents: Messrs. *Ranken Ford, Ford & Chester.*

Appeal dismissed.

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR v. NARAYAN GANPAYA HAVNIK.*

1914.

August 10.

Criminal Procedure Code (Act V of 1898), section 195 (1) (c)—Sanction to prosecute—Mamlatdar's Court—Enquiry into Record of Rights—Mamlatdar's Court is Revenue Court—Land Revenue Code (Bombay Act V of 1879), Chapter XII.

A Mamlatdar holding an enquiry relating to Record of Rights, under Chapter XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of section 195 (1) (c) of the Criminal Procedure Code (Act V of 1898).

THIS was a reference made by V. M. Ferrers, Sessions Judge of Kanara.

The facts were as follows. The accused claiming under a document purporting to be the will of one Bidre Tamanna, applied to the Mamlatdar praying that

* Criminal Reference No. 47 of 1914.

certain entries should be made in the Record of Rights, as provided in the will which he produced before the Mamlatdar. The Mamlatdar made the inquiry under Chapter XII of the Bombay Land Revenue Code (Bombay Act V of 1879), came to the conclusion that the will was a suspicious document, and declined to make any mutations in the Record of Rights.

The Sub-Divisional Magistrate then took up the case under section 190, clause (c) of the Criminal Procedure Code, and having come to the conclusion that the will was forged, committed the accused to take his trial before the Court of Session.

The Sessions Judge being of opinion that the commitment was illegal, referred the case to the High Court for quashing the order of commitment, on the following grounds :—

It is provided by section 195, Criminal Procedure Code, that "No Court shall take cognizance of any offence described in section 463...when such offence has been committed by a party to any proceeding in any Court...except with the previous sanction or on the complaint of such Court."

Now it is not disputed by the learned Public Prosecutor that the offence, which he alleges, comes within this definition, and that the Court in which it was committed was the Court of the Assistant Collector. It is presumed that the enquiry which that officer was conducting was of such a nature that his office is to be deemed a Civil Court in accordance with section 196 of the Bombay Land Revenue Code.

The Court therefore whose sanction or complaint is required is the Court of the Assistant Collector.

Now there is nothing on the record which purports to be a sanction or complaint by that officer. The Sub-Divisional Magistrate has taken up the case on his knowledge or suspicion. The point which requires decision is one of a very technical kind ; but, in point of law, the defence appears to be right in contending that this Court cannot take cognizance of this case.

The Sub-Divisional Magistrate was certainly not acting upon the complaint of the Assistant Collector's Court. He expressly states that he was not acting upon a complaint.

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Nor does it appear that he had the sanction of that Court before he took cognizance of the case. The very paper on which the Public Prosecutor relies is in itself the act of a Magistrate's Court; and such a Court could not in such a case as this pass such an order without antecedent sanction.

It does not appear that because a Magistrate happens also to be a revenue officer, he is dispensed from the restrictions of section 195: or that he can, in his Magisterial capacity, take cognizance without sanction or complaint of an offence committed in the Revenue Court in which also he happens to preside.

The obstacle thus thrown in the way of this Court being of a purely formal kind search was made in section 537 for an outlet. That section applies however exclusively to proceedings in confirmation, revision or appeal. Trial by Court of Session is neither confirmation, revision nor appeal.

The contention that there is in this case neither the complaint nor the sanction of the Assistant Collector's Court, and that therefore the order made in the Sub-Divisional Magistrate's Court on 26-2-1914 and the subsequent proceedings are without jurisdiction, appears to be in accordance with the letter of the law.

If the Court of the Assistant Collector and the Court of the Sub-Divisional Magistrate are regarded as one and the same, the case should have been sent elsewhere for trial in accordance with section 476.

But if there be two distinct Courts, then the Court of the Sub-Divisional Magistrate has no jurisdiction until the Court of Assistant Collector has made or sanctioned a complaint.

The reference was heard.

T. R. Desai, for the accused:—The Sub-Divisional Magistrate who committed the case had no authority to take cognizance in absence of a sanction by the Mamlatdar. The Mamlatdar who held the inquiry under Chapter XII of the Land Revenue Code (Bombay Act V of 1879) was a "Court" within the meaning of that term as used in section 195 of the Criminal Procedure Code. The term "Court" has been given a wide interpretation. See *Queen-Empress v. Munda Shetti*⁽¹⁾; *Raghoobun Sahoy v. Kokil Singh*⁽²⁾ and *In re Punamchand Maneklal*⁽³⁾.

⁽¹⁾ (1900) 24 Mad. 121.

⁽²⁾ (1890) 17 Cal. 872.

⁽³⁾ (1914) 38 Bom. 642.

S. S. Patkar, Government Pleader, for the Crown :—
The Mamlatdar proceeded under section 196 of the Land Revenue Code. He was not a Civil Court ; nor was he a Revenue Court. The case came to the notice of the Sub-Divisional Magistrate Mr. Maxwell as Assistant Collector and he was entitled to complain to his Court as a First Class Magistrate.

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HEATON, J. :—The Sessions Judge of Kanara has referred to us a case, which has been committed to him, on the ground that the commitment was illegal and ought to be quashed.

What had happened is this : after the death of a certain person, another person put forward a will which, he said, had been made by the deceased, and in virtue of this will he claimed a change in the entries in the Record of Rights. This claim became a disputed claim which, under rules made by the Government, had to be enquired into by the Mamlatdar. The Mamlatdar made his enquiry : he saw the will produced before him. He came to the conclusion that there was grave suspicion attaching to the will and he declined to recognize it as a basis for any change in the Record of Rights. Eventually the case was taken up by a Sub-Divisional Magistrate, under clause (c) of section 190 of the Criminal Procedure Code, and was inquired into by him as a Magistrate and finally was committed to the Court of Session. As I mention his proceedings, I would like to say this : that they have been conducted in the most painstaking and thorough way and the mistake which has occurred is one which, at any rate, casts no reflection whatever on the manner in which he conducts magisterial work. The mistake is this : if the Mamlatdar in making his enquiry was a " Court " within the meaning of that word as used in clause (c) of section 195, then a sanction or complaint was required as provided by section 195, before this case could proceed. We have

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come to the conclusion that the Mamlatdar in making this enquiry was a "Court". I should describe him as a "Revenue Court" but it matters very little whether you describe him in that way or as a "Civil Court". The judicial result is precisely the same in a matter of this kind. I say that he was a "Court" for these reasons: he had power to summon witnesses, to take evidence, although it may be not to administer an oath, to consider the evidence and to make a final order which might be, as in this case, an order of great importance and would be final unless changed by his superior on revision or appeal until there had been a decision of a Civil Court which conflicted with it. It seems to me that there are all the ingredients required for a Court, in these matters that I have stated. Therefore, I think that a sanction was necessary in this case. But I think it is more than a merely technical defect that there is not a sanction and for this reason. Supposing that a person aggrieved had applied to the Mamlatdar for sanction and supposing the Mamlatdar had, as he properly ought to do, called on these accused persons to show cause why sanction should not be given, and supposing then that they said "sanction should not be given because we are about to apply for probate of this will": if that were their reply, then I say it would be a monstrous thing for a Court forthwith to give the sanction. It might say "I will allow you a month or two months" or whatever period might be reasonable within which to apply for probate "and if within that time you have not applied, then I shall grant a sanction." That view of the case shows, I think, very clearly that in a matter of this kind where there has been no inquiry into the genuineness of the will by a Court of Probate or by a Civil Court, the conducting of a prosecution without a sanction amounts to very much more than a mere technical defect.

We think that the proper order for us to make in this case is to quash the order of commitment and the whole of the proceedings before the Magistrate. And if it is determined, that this prosecution should take place, it must take place with that foundation and beginning which the law requires.

SHAH, J. :—I am of the same opinion. The inquiry made by the Mamlatdar in this case was one which he was legally empowered to make under the rules relating to the Record of Rights. In conducting the enquiry he could exercise the powers referred to in Chapter XII—particularly in sections 189 and 197—of the Land Revenue Code. He summoned the party interested and recorded evidence before making his order relating to the disputed entry in the Record of Rights. Section 196 of the Land Revenue Code has no application to this inquiry as it is neither formal nor summary under the Act. It may be, therefore, that the Mamlatdar cannot be deemed a Civil Court for the purposes of the inquiry. But I feel clear that the Mamlatdar holding an inquiry as provided in Chapter XII of the Land Revenue Code is a Revenue Court within the meaning of section 195, subsection (1), clause (c) of the Criminal Procedure Code. As the offence in question is in respect of a document produced before the Mamlatdar in the inquiry made by him, and as there is no sanction or complaint of the Mamlatdar or of any other Revenue Court to which he is subordinate, it is clear that the Magistrate had no jurisdiction to take cognizance of the offence.

Order set aside.

R. R.

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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

YESHWANT VISHNU NENE, APPELLANT AND PLAINTIFF, *v.* KESHAV-
RAO BHAJI AND OTHERS, RESPONDENTS AND DEFENDANTS.*

1914.
August 14.

Fazendari tenure—Sub-lease by a Fazendar.

The plaintiff, claiming under the original Fazendar, sublet certain land to the defendants' predecessor. The agreement, after reciting (*inter alia*) that the sub-tenant took the land on Fazendari tenure, continued :—

"I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession, and if the land be required, you are to pay me the valuation of the said house whatever the same may come to."

Held, on the facts, that, on the true construction of the lease, the plaintiff was not entitled to eject the defendants.

The meaning of the word 'Fazendari,' when it occurs in a written document embodying the contract between the parties, considered, and the remarks of Farran J. in *Parmanandas Jivandas v. Ardeshir Framji*⁽¹⁾, approved.

THIS suit was filed by the plaintiff for the recovery of the possession of certain land occupied by the defendants. The lower Court (Beaman J.) dismissed the suit, one of the grounds of dismissal being that the original lessor (under whom the plaintiff claimed), having held the land in relation to Government as a Fazendar and therefore in perpetuity had himself leased it in perpetuity to the defendants' predecessor-in-title by leasing it on 'Fazendari tenure.' The plaintiff appealed.

The terms of the agreement under which the parties claimed and the facts of the case appear sufficiently set out in the judgment of the Appeal Court.

Setalvad, with him *Desai*, appeared for the appellant.

Kanga, with him *Jardine* (acting Advocate-General), appeared for the respondents.

SCOTT, C. J. :—This is an ejectment suit in which the plaintiff represents the landlord under two agreements

* Original Suit No. 74 of 1913, Appeal No. 9 of 1914.

⁽¹⁾ (1886) Suit No. 263 of 1883. See note on p. 320.

of 1859 and 1860 and the defendants represent the tenant under those agreements.

The question is whether the plaintiff is entitled at any time to determine the tenancy which has been subsisting since the date of those agreements.

Now, the first of them, Ex. A, is dated the 5th of March 1859, and the tenant there agrees as follows :—

“There is your Wadi by name Charni situate on the sea-shore. I have taken the land Fazendari (or on Fazendari or as Fazendar) being a portion of this Wadi on the southern side for building a Cadjan house..... On this land I shall build a house at my cost within Rs. 50. The ground rent in respect of the same is fixed at Rs. 6 per annum which I will continue to pay from year to year. I will pay the bill of assessment, and, if at any time you be in need of the ground appertaining to this house, I am to give the said ground to you and you are to pay me Rs. 50 being the valuation thereof agreeably to what is written above.”

At that time the intention was to build a Cadjan house of the value of only Rs. 50 and the tenant agreed to give up ground whenever it was required by the landlord.

In the following year, an agreement, somewhat different in terms, was entered into. It recites that the tenant has taken on Fazendari land in the Wadi for the purpose of building a Cadjan house thereon. The agreement then continues :—

“I shall build a house in the said Wadi at my own cost. The Fazendari rent in respect thereof is fixed at Rs. 9 per annum which I will continue to pay to you from year to year..... Should assessment be required to be paid in respect of the said house I will pay it whatever the same may come to. I shall build a house on this land and live in it peacefully. I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession and if the land be required, you are to pay me the valuation of the said house whatever the same may come to. Otherwise I shall pull down my house and remove it.”

It is to be observed that the value of the house is not stated in that agreement, but the rent is raised fifty per cent. from Rs. 6 to 9 and the condition as to

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surrender is worded quite differently. The tenant is to live in the Wadi so long as it remains in the possession of the landlord. He is to be paid the valuation of the house when the Wadi ceases to be in the landlord's possession and the land is required. Therefore his possession will not cease merely upon the wish of the landlord. For instance, if the landlord remains in possession and wishes him to vacate, he would not have to vacate according to the condition in the second agreement.

Now, we think that the landlord whose possession is contemplated there must include both the landlord and his assigns and in the same way the tenant would include his assigns. Here we have a suit in which the landlord sues to eject according to the terms of the agreement while he remains in possession of the Wadi and the land is not required by any one else. It appears to us that under the terms of the agreement he has no right in such circumstances to eject the tenant. That disposes of the suit and the decree of the lower Court dismissing the suit must be affirmed.

It must not be supposed, however, that we accept the view of the lower Court with regard to the meaning of Fazendari when it occurs in a written document embodying the contract between the parties. On that point, we entirely agree with the remarks of Mr. Justice Farran in *Parmanandas Jivandas v. Ardeshir Framji*⁽¹⁾.

We also do not agree with the learned Judge in holding that the plaintiff's suit is barred by limitation. In the letter of the 7th of July 1871, the tenants, who were then Atmaram Bhikaji and Bhai Lakshmanji, predecessors-in-title of the present defendants, instructed their

⁽¹⁾ (1886) Suit No. 263 of 1883. See note on p. 320

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attorneys to say that they did not recognize Ramnath Dadaji, predecessor of the present plaintiff, as the Fazendar of the premises and could not see what right he had to interfere. Unless, therefore, Ramnath showed them that he was the Fazendar, they would complete purchase without regard to the threats contained in his letter. Then on the 19th of July, after having been informed of the title of Ramnath Dadaji, the attorneys of Atmaram Bhikaji and Bhai Lakshmanji stated that they were ready and willing to pay rent at the rate of Rs. 9 per annum if Ramnath removed the foundation of the wall which he had laid in front of their clients' house and allowed the use of the old privy.

There is, therefore, no denial of the title of Ramnath Dadaji as the landlord of this ground, and, although there is no evidence that rent was paid between 1871 and 1901, the mere non-payment of rent by a tenant, if the tenancy is not determined, does not give him a right to the property as against his landlord. Then it appears that in 1901 the plaintiff sued the defendants for rent according to the terms of the agreement of 1860, and, after evidence had been given by the plaintiff, the defendants agreed to a decree for the amount of rent prayed, on condition that the summons in the suit was amended by the insertion of the word "Fazendari" as indicating the nature of the rent. We are of opinion that that word, even though agreed upon as indicating the nature of the rent, does not decide the terms upon which the defendant held and still holds for his tenure must depend upon the terms of the agreement of 1860. Upon the terms of that agreement, we are of opinion, for the reasons already stated, that in the circumstances which have been established in this case, the plaintiff has no right of ejectment.

We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs

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Attorneys for the appellant: Messrs. *Dikshit and Purushottamrai*.

Attorneys for the respondents: Messrs. *Judah and Solomon*.

Appeal dismissed.

K. McI. K.

NOTE.—The following is the material portion of the judgment delivered by Farran J. in *Parmanandas Jivandas v. Ardeshir Framji*, on the 2nd December 1886.

FARRAN, J.—The plaintiff in this suit claims to eject the defendant from, and to recover possession of, a piece of land at Bhundarwara Hill in the Island of Bombay admeasuring 675 square yards. He also claims damages from the defendant on account of his wrongful occupation of the land.

The defendant as to about 575 square yards of the land claimed by the plaintiff denies the right of the plaintiff to eject him therefrom, and claims to hold the same from the plaintiff upon a Fazendari tenure which gives him the right to remain in possession of the land upon payment of a fixed annual rental of annas two per square yard so long as the plaintiff's title to the Bhundarwara Hill continues. As to the residue of the 675 square yards the defendant lays no claim thereto, and says that he is not in actual occupation thereof.

It is not denied that the plaintiff is the holder under Government of the Bhundarwara Hill of which the pieces of land, the subject-matter of this suit, form part. By indenture of lease bearing date the 1st October A.D. 1794, the East India Company demised the Bhundarwara Hill to one W. H. Blackford for ninety-nine years from the date of the lease at an annual rental of Rs. 324-4-0 and a premium or fine of one *phara* of *bhat* at the expiration of every twenty-one years of the term. The lease also contained a covenant by the East India Company that they would, upon the expiration of the term, and upon the application of the heirs, executors, administrators of the lessee, regrant and renew the said lease on the same terms and conditions upon their paying to the lessor an additional fine or premium of Rs. 90 for such renewal, and it was further provided that, if the said leases should not be renewed, the lessors would pay to the representatives of the lessee half the real value of the buildings and plantations which should then be on the land demised. The lease, therefore, unless renewed by the plaintiff, will expire upon the 1st of October 1893.

The plaintiff is now the assignee of this lease. By various mesne assignments, which have not been put in evidence, it passed to Canjee Chattoor, the

grand-father of the plaintiff. Canjee Chattoor died in 1859 having devised his property, including the Bhundarwara Hill, to his sons Runchordas Canjee and Jiwandas Canjee. Jiwandas Canjee died intestate on the 2nd March 1859 leaving the plaintiff, then a minor, his only son. Runchordas Canjee died without issue in the year 1859 leaving a will bearing date the 12th May 1859, by which, subject to certain bequests, he purported to devise and bequeath the whole of the property left by Canjee Chattoor to the plaintiff. This will was proved on the 30th June 1859, by Lakhmidas Damji, Bhanabhai Dwarkadas and Jivraj Champs, three of the executors named in it. On the 4th May 1870, the executors made over the property comprised in the will of their testator to the plaintiff, he having then attained the age of eighteen years. The above is the nature of the tenure upon which the Bhundarwara Hill property is held by the plaintiff, and of the plaintiff's title to it.

I proceed to consider how the defendant became a tenant upon the property. The nature and incidents of that tenancy are the questions to be determined in this suit. D. and M. Pestonji were the assignees of the lease of the Hill in 1850. The earliest document connected with the defendant's title is a certificate dated the 24th January 1850 by which D. and M. Pestonji certify "that one Manekbai had their permission to build her house upon their ground, part of Bhundarwara Hill—Collector's No. 19 of ground rent for which she pays to us ground rent." No further description of the land is given in the certificate. In the first document in the bundle, Ex. G, which was produced by the defendant and put in by the plaintiff, Manekbai was the sister of the defendant's father.

The next document in order of date is Ex. D. The plaintiff says that he received it from the executors of Runchordas Canjee in 1870. It bears date the 20th March 1850. It purports to be an indenture of lease between D. and M. Pestonji of the one part and Manekbai of the other part whereby the lessors demise to Manekbai all that piece or parcel of land on Bhundarwara Hill more particularly described in the plan annexed whereon it is coloured red and which contains 189 square yards or thereabouts, to have and to hold the same unto Manekbai, her executors, etc., from the 1st January 1850, as a monthly tenant yielding and paying therefor on the first day of every month the rent or sum of Rs. 1-15-6, and whereby Manekbai covenants with the lessors to pay the said monthly rent and that she will, at any time within one month, next after any notice in writing given to her, quit and deliver up the demised premises to the lessors, and that she will not assign or part with her interest in the said demised premises or in any part thereof without the consent in writing of the lessors first had. And it is provided that in case of the rent being in arrears for ten days after demand, or if the lessee attempt to assign or shall not deliver up possession to the lessors after notice, the lessors may re-

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enter, and that the lessee shall be liable to pay Rs. 5 per diem for every day she shall remain on the premises after the expiration of the notice to quit.

This document purports to be signed and sealed by Manekbai. No corresponding document executed by the lessors is produced by the defendant and he says that he never saw or heard of such a document.

There is no ground for doubting the genuineness of Ex. B. It is more than thirty years old and came from the proper custody. From the first rent receipt produced by the defendant it appears that Manekbai paid Rs. 23-10 as a year's ground rent for 189 square yards at Bhundarwara to the trustees of D. and M. Pestonji for the year ending 31st December 1850 : see Ex. G2. In that year at all events Ex. B may be presumed to have been acted on and to have contained the terms upon which Manekbai held the 189 square yards of land demised by it.

In the next year, 1851, Canjee Chattoor became the assignee of the lease of Bhundarwara Hill. He adopted the printed form of lease used by his predecessors-in-title changing only the names of the lessors to his own, and the plaintiff produces a document in such printed form bearing date the 8th December 1851 containing terms the same as those in Ex. B. By it Canjee Chattoor purports to lease to Manekbai 208 square yards of land at Bhundarwara Hill as a monthly tenant at the rental of Rs. 2-2-8 per month from the 1st January 1851. This also purports to be executed by Manekbai, see Ex. C. Under this lease Manekbai paid rent for 1851, for the defendant produces a receipt in her favour signed by Canjee Chattoor for a year's ground rent, from 1st January 1851 to 31st December of that year, of a spot at Bhundarwara Hill containing 208 square yards : see Ex. G3. No receipt is produced for the rent payable for this year under Ex. B.

The defendant produces a receipt signed by Canjee Chattoor in favour of Manekbai for the rent of 344 square yards of vacant ground situated at Bhundarwara Hill No. 28 for one year from 1st January to 31st December 1852, Rs. 43. Deduct as allowed Rs. 9 = Rupees 34. See Ex. G4. No. 28 is the number borne by the lease Ex. C.

The aggregate of the land leased by Ex. B and Ex. C is 397 square yards (189 + 208) and does not correspond with the amount of land mentioned in this receipt, Ex. G4. The rental renewed by Ex. B amounts to Rs. 23-10 per annum and that by Ex. C to Rs. 26 = Total Rs. 49-10.

The receipt produced by the defendant for 1853 is for yearly rent of the vacant ground situated at Bhundarwara occupied by Manekbai from 1st January to 31st December 1853 measuring 344 square yards, rent Rs. 43 : see Ex. G5.

The receipt produced by the defendant for 1854 is for the annual rent of the vacant ground situated at Bhundarwara occupied by you from 1st January to

30th January 1854, Rs. 19-8. From 1st July to 31st December measuring 247 square yards Rs. 15-7 = Total Rs. 34-15. Ex. G6.

The next receipt is important. I transcribe it.

"To amount of Fazendari rent of 247 square yards of ground situated at Bhundarwara Hill, Mazagaon, for one year from 1st January to 31st December 1855, Rs. 30-14, Bombay 1st January 1856, E. E. and contents received. (Signed Canjee Chattoor)" G7. The only oral evidence adduced down to the period of term is that of the defendant who says that he first knew the land in 1855; that there was then a masonry building upon it which was at that time about five years old. This, I consider, must have been on the land referred to in the receipt Ex. G7.

From the foregoing I am asked by the plaintiff to draw the conclusions :—

(1) That the 247 square yards of land referred to in the receipt Ex. G7 are the same land as the land leased by Ex. B and Ex. C together or form part of the same land which amounted to 397 square yards.

(2) That the land referred to in the receipt Ex. G7 continued to be held upon the terms of Ex. B and Ex. C at the date of Ex. G7 and after that date.

There is no description of the land leased by Ex. B other than that contained in the plan annexed to it which shows that it lay to the West of Lawrence De Lima Street. There is no description of the land demised by Ex. C other than that it was in Bhundarwara Hill, but, as Manekbai built a house before 1855 on the land comprised in receipt Ex. G7 and as it lies to the West of Lawrence De Lima Street and as it is not alleged that she held any land at Bhundarwara Hill other than the lands in respect of which the defendant produces the rent-receipts and as the number in G7 corresponds with the number in Ex. C and as no suggestion has been made to the contrary, I consider that I am justified in assuming that the 247 square yards of land referred to in Ex. G7 formed portion of the 397 square yards leased by Ex. B and Ex. C taken together.

There is of course a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant, and, unless the contrary is shown by evidence of a cogent nature, a jury would be directed to draw an affirmative inference to that effect.

The following circumstances may be urged in this case as rebutting that presumption :—

(a) That the land held by Manekbai in 1855 was less by 150 square yards than the land leased to her by Ex. B and Ex. C.

(b) The general improbability of any prudent person building upon land held under the stringent conditions contained in the leases Ex. B and Ex. C and on the precarious tenure created by these leases.

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(c) That in 1855 the form of the rent bill sent to Manekbai was altered by the introduction of the word "Fazendari" before the word "rent".

The reduction in the quantity of land held by Manekbai is not a matter of weight. The land was held upon a monthly tenure. Part of the extra quantity taken up in 1851 was probably necessary for her when engaged in building her house which she would naturally give up when her house was completed. She apparently gave it up at the end of the year 1851. That of itself would not alter the tenure of the residue or raise any presumption tending in that direction.

The apparent imprudence of Manekbai building upon land held upon such a frail tenure is not of great importance inasmuch as the building certificate of 1850 and her having built or commenced to build in that year shew that she must have considered the terms of Ex. B such as to justify her in laying out her money upon the land held under it. Land was less valuable then than it is now and she probably relied upon the honour of D. and M. Pestonji and of Canjee Chattoor, forgetting that their successors-in-title might not possess or inherit the same feelings.

There remains the introduction of the word "Fazendari" into the rent bills.

The circumstances existing at the time this was done do not favour the contention that the tenure was then altered.

The rent was continued at the same rate As. 2 per square yard per annum. It is unlikely the lessor would have abandoned the advantages he possessed under the leases B and C without obtaining some corresponding advantage in the shape of an increased rental. Manekbai's house had been then long completed. There was no change in ownership; why then a change of tenure? The time when Manekbai commenced to build would presumably be the time when she would have taken steps to strengthen her tenure and not when her house had been completed and she had no means of compelling her landlord to accede to her wishes.

At this time Canjee Chattoor was granting leases in the same form as Ex. B and apparently for building purposes. See Ex. H and I put in as specimens. One of these is a monthly, and the other is a yearly tenancy. He has not been shown to have leased any land upon a more permanent tenure.

If such a very important change was effected in 1855 in Manekbai's tenure it must have been of design on Manekbai's part, and at her request. Would she not have obtained some writing evidencing the change, and not rested content with a mere change of wording in her rent bills?

The whole theory of a change of tenure rests therefore upon the introduction of the word 'Fazendari' into the rent bills, and this leads to a consideration of

what is the generally accepted meaning of that word. No evidence has been given upon this point. My experience is that it is used with reference to tenants holding under a private landholder to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties.

Perry C. J. in *Doe d. Dorabji v. Bishop of Bombay*⁽¹⁾ thus says that the true meaning of 'Fazendari land' is land not belonging to Government. "A Fazendar occupying and tilling land himself, and paying a fixed rent to Government; or one making contracts with tenants to occupy the Fazendari land on terms to be agreed between them; or one merely receiving a certain fixed sum by virtue of ancient usage, are all Fazendars in the eye of Government, and in the popular language of the Bazar. But in these three persons we perceive three different characters, with wholly different legal relations attachable to them, and for the most part equivalent to our English notions of a tenant in fee simple holding of a superior lord by rent service, a landlord demising at rack rent, and a party seized of an ancient rent issuing out of the land. But as this ambiguity is contained in the word Fazendar, we must be cautious how we apply general propositions to the term."⁽²⁾ Yardley J. at page 508 of the report attaches similar meanings to the term 'Fazendar' in Fazendari tenure.

The word being thus ambiguous it would be dangerous to assign to its introduction into a rent bill an indication that the parties thereby intended that a monthly tenancy should be converted into a perpetual one. In this case the framers of the rent-bills produced by the defendant have varied the language in describing the rent paid by the holder of the land in question from time to time. The description is generally inaccurate. In my judgment the introduction of the word 'Fazendari' into the rent bills may indicate a change in the person of the English writer who drew them out for Canjee Chattoor or a desire on the part of that gentlemen to have the title of Fazendar attached to his name just as much as a change in the tenure under which the land was held. The title of Fazendar as it was used to describe the plaintiff in the case of *Doe d. Dorabji v. Bishop of Bombay*⁽¹⁾ was quite inapplicable to Canjee Chattoor who held under the leases from Government of which he was assignee.

For these reasons I am unable to hold that there is any proof that Manekbai's tenure of the land she held was of a permanent character such as is described as a Fazendari tenure in the more limited sense.

⁽¹⁾ (1848) Perry O. C. 498.

⁽²⁾ (1848) Perry O. C. 506

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CRIMINAL APPELLATE.

Before Mr. Justice Heaton and Mr. Justice Shah.

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1914.

September 14.

Practice—Sentence—Previous conviction—Relevancy of previous conviction for the purpose of determining extent of sentence—Indian Penal Code (Act XLV of 1860), section 75—Indian Evidence Act (I of 1872), sections 54, 165.

The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced after the accused is found guilty, as an element to be taken into consideration in awarding punishment.

Per SHAH, J.:—The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment.

APPEAL from conviction and sentence recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was tried for an offence punishable under section 353 of the Indian Penal Code, in that he assaulted an Abkari sepoy.

There was a previous conviction against him for assaulting an Abkari sepoy in 1905.

The trying Magistrate heard the evidence and came to the conclusion that the accused had committed the offence. He then let in proof of the previous conviction against the accused and sentenced the accused to suffer rigorous imprisonment for nine months.

The accused appealed to the High Court.

Velinkar, with *B. T. Desai*, for the accused:—Section 54 of the Indian Evidence Act, before its amendment by section 6 of Act III of 1891, ran as follows: "In Criminal

* Criminal Appeal No. 354 of 1914.

proceedings, the fact that the accused has been previously convicted of any offence is relevant ; but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant". In *Queen-Empress v. Kartick Chunder Das*⁽¹⁾, which was decided under the old section 54, a Full Bench of the Calcutta High Court held that a previous conviction was in all cases admissible in evidence against an accused person. This led to an amendment of the section ; and the Legislature excluded evidence of previous convictions except in certain cases mentioned in the section. In the section as it stands now the terms "previous conviction" and "the fact that the accused has a bad character" are treated as synonymous. Hence proof of previous conviction can now be given only under certain circumstances.

Section 75 of the Indian Penal Code does not apply to the present case. Section 310 of the Criminal Procedure Code has reference where a charge under section 75 of the Indian Penal Code is one of the charges in the indictment. My contention derives support from the terms of section 311 of the Criminal Procedure Code, which provides that evidence of previous conviction may be given if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act. See also *Emperor v. Duming*⁽²⁾.

S. S. Patkar, Government Pleader, for the Crown :—There is no illegality in allowing the conviction to be proved. Section 54 of the Indian Evidence Act has no application. The Magistrate has to decide for himself what punishment he will inflict. One of the circumstances to guide him is the antecedents of the accused.

HEATON, J.:—This is an appeal against a conviction for using criminal force to deter a public servant from

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the discharge of his duties. The offence consists in this that the two accused succeeded in preventing the arrest of a person who was believed to be taking part in traffic in cocaine. The two accused were sentenced and we are dealing with the appeal of one of them.

On the evidence, I think, the Magistrate was right in holding that the offence was committed. The chief question argued is this: is a previous conviction one of the matters which a Court is permitted to consider in imposing sentence? The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere not of evidence but of penology. Section 54 of the Indian Evidence Act is a part of the Law of Evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the enquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction, is irrelevant to help to establish an accused person's guilt. But the Law of Evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be, is largely left to practice and to the common sense and knowledge of the world of the Court. Where they are definitely indicated, this is done in the Indian Penal Code and the law of Criminal Procedure, the Whipping Act and so forth; most emphatically not in the Law of Evidence. One might as reasonably, I think, look to the Law of Evidence for information as to the maximum sentence to be imposed. In my judgment, therefore, to apply section 54 of the Indian Evidence Act to the matter now before us is as much out of place as to apply, say, the Hindu Law to an

European's will. Of course, the previous conviction, if it is to be taken into account, must be proved to the satisfaction of the Court, and in the matter of proving it, it may be that the provisions of the Indian Evidence Act apply. I do not wish to express any opinion on that point.

Having regard to the previous conviction, I think that the sentence imposed in this case is appropriate to the offence and I would dismiss the appeal and confirm the conviction and sentence.

SHAH, J.:—I agree that the conviction and sentence must be confirmed in this case. The conviction is undoubtedly right. We took time to consider the question of sentence. It is argued by Mr. Velinkar that the sentence must be based upon materials which are relevant under the Indian Evidence Act, and that the previous conviction which is taken into consideration by the lower Court is irrelevant under section 54 of that Act.

The previous conviction is used in this case not for the purpose of affecting the punishment to which the accused is legally liable, but merely to influence the Court in determining the amount of punishment, which it should award. The conviction in this case is under section 353 of the Indian Penal Code, and the previous conviction in question was for assaulting an Abkari sepoy on the 5th August 1905,—apparently under section 353 of the Indian Penal Code. I think that under section 165 of the Indian Evidence Act the judgment must be based upon facts declared by the Act to be relevant and duly proved. Under the Criminal Procedure Code the judgment or the particulars to be recorded by a Presidency Magistrate would include the punishment, to which the accused is sentenced. It is clear that the sentence must be based upon facts which are relevant under the Indian Evidence Act. I

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am, however, unable to accept Mr. Velinkar's argument that under section 54 a previous conviction is irrelevant just as the fact that the accused person has a bad character is irrelevant. His contention in effect is that the expressions "bad character" and "previous conviction" are mutually convertible terms within the meaning of section 54. If the section, as it is now and as it was before the Amending Act III of 1891, be carefully read, it seems to me clear that these expressions cannot be treated as having exactly the same meaning and scope. Though the fact of bad character is irrelevant except as provided in the section itself, it does not follow that a previous conviction is similarly irrelevant.

The case of *Emperor v. Duming*⁽¹⁾, which is relied upon by Mr. Velinkar in support of his contention, is really not in point. There the evidence of a previous conviction was admitted before the conviction of the accused of the offence charged; and the observations in the judgment have relation to that fact. The question raised in this appeal, viz., whether after conviction the proof of a previous conviction not covered by section 75 of the Indian Penal Code can be given, did not arise and could not have been considered in that case.

I have also considered the provisions of section 348 of the Code of Criminal Procedure in connection with this point. In my opinion the section does not touch the point that has been argued in this appeal.

It follows that the proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly

(1) (1903) 5 Bom. L. R. 1034.

relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment. The lower Court was justified in taking it into consideration in deciding the question of punishment after the accused was found guilty. I do not say that any previous conviction not covered by section 75, Indian Penal Code, is relevant to the question of sentence. But the question of relevancy of a previous conviction not falling under section 75, Indian Penal Code, must be considered and decided in each case as it arises with reference to the circumstances of that case.

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Order accordingly.

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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

IN THE MATTER OF THE INDIAN COMPANIES ACT (VI OF 1882), AND IN THE MATTER OF THE CREDIT BANK OF INDIA, LIMITED (IN LIQUIDATION):

1914.

August 18.

FAZULBHOY JAFFER, APPLICANT AND APPELLANT, v. THE CREDIT BANK OF INDIA, LIMITED (IN LIQUIDATION), BY ITS OFFICIAL LIQUIDATOR, R. D. SETHNA, RESPONDENT.^c

Company—Winding up—List of contributories—Minor—Estoppel by conduct after attaining majority—Indian Companies Act (VI of 1882).

F, a minor, applied for and was allotted certain shares in a limited company. He received dividends, and continued to do so after attaining majority. On the winding up of the company he was included in the list of contributories.

Held that, having intentionally permitted the company to believe him to be a share-holder and in that belief to pay him dividends since he attained majority, he was estopped by his conduct while a person *sui juris* from denying as between himself and the company that he was a share-holder.

View of Stirling J. in *Re Yeoland Consols Limited (No. 2)*⁽¹⁾ adopted.

^cAppeal No. 8 of 1914.

⁽¹⁾ (1888) 58 L. T. 922.

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A minor may be a member of a company under the Indian Companies Act (VI of 1882).

APPEAL from a decision of Macleod J. in Chambers in liquidation proceedings.

On 8th January 1910 one Fazulbhoj Jaffer, a minor, applied for and was allotted 50 shares in the Credit Bank of India, Limited, and thereafter received the dividends paid from time to time. In or about August 1912 he attained his majority, and continued to receive dividends up to the date when the Court ordered the winding up of the said Bank. He was duly included in the list of contributories made out by the official liquidator, but applied to have his name struck off the list on the ground that he was a minor at the date of purchase and therefore not liable.

His application was refused on the following grounds :—

MACLEOD, J. :—This is an application by a share-holder to be struck off the list of contributories on the ground that he was an infant at the time he applied for the shares and that, therefore, his contract with the Company was void. The applicant may be considered to be in the same position as a share-holder whose name has been put upon the register either without his consent or without any application on his part. As soon as he becomes aware of the fact he may refuse to accept the ownership of the shares within a reasonable time but if he allows his name to remain on the register without doing anything he must be taken to have acquiesced. In *Ebbetts' case*⁽¹⁾ a minor made a similar application, and Giffard L. J. remarked : " I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register."

⁽¹⁾ (1870) L. R. 5 Ch. 302.

Again in *Re Yeoland Consols Limited (No. 2)*^(a) the applicant was put upon the register when a minor without any application on his part. On an application to remove his name from the list of contributories on the winding up Stirling J. said : " Being on the register of the Company for the shares he is *prima facie* entitled to them. Shares are property which may turn out to be valuable, and may on the other hand turn out to carry with them only a very serious liability. The law assumes that where property is assigned to a person the assignee accepts it, but he may refuse to accept it if he does so within a reasonable time." The present applicant knew he was on the register for the shares. From his coming of age in July or August 1912 till the winding-up order was made in November 1913 he must be taken to have known that his name was on the register and since he chose to allow his name to remain there without doing anything it cannot now be removed.

The applicant appealed.

Kanga appeared for the appellant.

The Official Liquidator appeared in person.

SCOTT, C. J. :—The appellant appeals from an order of the Chamber Judge including him in the list of contributories in the Credit Bank of India, a limited Company now being wound up by the Court. The appellant applied for fifty shares in this Company which were allotted to him on the 8th of January 1910 on payment of Rs. 10 per share, the nominal value being Rs. 50. If he has been rightly included among the contributories he will be liable for Rs. 40 per share. He contests his liability on the ground that he was a minor at the date of the allotment. It is not disputed that he attained majority in August 1912. He has

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received dividends at the rate of six per cent. per annum on the sums paid upon his shares twice in each of the years 1911, 1912, and 1913, and he has raised no objection to his name being included in the register of members until January 1914. Under these circumstances it cannot be doubted that he has intentionally permitted the Company to believe him to be a shareholder and in that belief to pay him dividends on his shares since he attained majority. He is therefore estopped now by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he is a share-holder.

This is sufficient to dispose of the appeal ; but we will express our opinion upon the point made in the excellent argument of Mr. Kanga. His contention was that the matter must be decided according to the law contained in the Contract Act under which a minor is not competent to contract and therefore it cannot be said that he has agreed with the Company to become a member which is one of the conditions of membership under the Companies Act of 1882, section 45. This argument would be more convincing if the words used in section 45 were "has contracted with the Company," for under the Contract Act it is not every agreement that is a contract. Moreover, it appears from the Statutory Article 45 in Table A of the Companies Act that a minor may be a member of a Company under that Act.*

It has been settled law in England for many years that a registered holder of shares in a Statutory Company is a person with a vested interest in property which may be burdened with an obligation to pay calls in the future. The registered member "cannot keep

*Note.—In the Indian Companies Act VII of 1913, Schedule 1, Table A, Article 62, which corresponds to Article 45 of Table A in the Act of 1882, all reference to minors is omitted. [Editor.]

the interest and prevent the Company from having it, and dealing with it as their own, without being bound to bear the burthen attached to it": *London and North-Western Railway Company v. M' Michael*.⁽¹⁾

This view of the position of a share-holder pleading minority when registered was taken by Stirling J. in *Re Yeoland Consols Limited (No. 2)*⁽²⁾ and the learned Chamber Judge has, we think, rightly adopted it in the present case. The same principle underlies section 248 of the Contract Act. *Qui sentit commodum sentire debet et onus*.

Attorneys for the appellant: Messrs. *Jehangir, Sirvai, Minocheher and Hiralal*.

Attorneys for the respondents: Messrs. *Payne and Co.*

Appeal dismissed.

K. McI. K.

⁽¹⁾ (1851) 20 L. J. Ex. 97 at p. 101. ⁽²⁾ (1888) 58 L. T. 922.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SUBAPPA BIN SHENKAREPPA NADGAUDA (ORIGINAL PLAINTIFF),
APPELLANT *v.* VENKAPPA BIN GOLAPPA AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), Articles 142, 144—Suit for possession—

De facto possession with defendant—Burden of proof.

Where the plaintiff alleges possession of land, and it is found that part of the land is *de facto* in possession of the defendant, the case falls under Article 142, and not Article 144, of Schedule II to the Indian Limitation Act (IX of 1908). Every suit for possession of immovable property, in which the plaintiff alleges that he has had possession, must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the

* Second Appeal No. 543 of 1913.

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plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within twelve years of the date of the suit.

SECOND appeal from the decision of D. S. Sapre, First Class Subordinate Judge at Bijapur, modifying the decree passed by R. G. Shirali, Subordinate Judge at Muddebihal.

Suit to recover possession of land.

The plaintiff let the land in dispute to defendant No. 1 in 1900 for a period of nine years. He alleged that he was requested by his tenant at the end of the term, to prolong the tenancy but as he declined to accede to the request, defendant No. 1 colluded with defendants Nos. 2 and 3 and got a portion of the land transferred to their names in the Record of Rights. The defendant No. 1 having declined to deliver possession of the land, the plaintiff sued to recover its possession.

The defendant No. 1 admitted the tenancy ; but expressed his unwillingness to deliver possession of the land as the term of the lease had not expired.

Defendants Nos. 2 and 3 contended *inter alia* that they were all along in possession of a portion measuring 9 acres of the land ; that the same was awarded to them for maintenance as plaintiff's *bhaubandhs* : and that they had become owners of the land by their adverse possession for more than 12 years.

The Court of first instance held that the plaintiff was the owner of the land in suit ; that the plaintiff was in possession of the same within 12 years before the date of the suit ; and that the suit was in time. The suit was therefore decreed.

On appeal, the lower appellate Court held that defendants Nos. 2 and 3 had made out their title to 9 acres of the land ; and that the plaintiff was not in possession

of that portion within 12 years before the date of the suit. The decree of the lower Court was therefore modified by releasing the nine acres from its operation.

The plaintiff appealed to the High Court.

Baptista, with *S. R. Bakhale*, for the appellant.

P. D. Bhide, for respondents Nos. 2 and 3.

BEAMAN, J. :—The plaintiff brought this suit to recover certain land from the possession of defendant No. 1, who, he alleged, was his tenant. He appears to have joined defendants 2 and 3, because, in collusion, as he says, with defendant No. 1, the name of defendant No. 2 had been entered as owner of this land, or part of it, in the Record of Rights.

The learned Judge of first appeal has broken up the land into two parts, in respect of one of which he has decreed the plaintiff's claim in full, holding that that land was in the possession of defendant No. 1 as tenant of the plaintiff. In respect of the other portion of the land in suit, the learned Judge of first appeal appears to have come to the conclusion that that land was *de facto* in possession of the defendants, and therefore, that the plaintiff's suit fell under Article 142 of the second schedule to the Limitation Act. Accordingly, he held that the plaintiff had been unable to prove possession of this portion of the plaint land within twelve years of the suit as required by that Article, and so in effect dismissed his suit as against these defendants in respect of the land so found in their possession.

It has been contended here that the plaintiff's suit against defendants Nos. 2 and 3 really fell under Article 144, and not under Article 142. The written statement of these defendants certainly appears to set up a claim by adverse possession, as well as on a title which the Courts below found was not proved. Having regard, however, to the fact that in respect of all the

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land the plaintiff has certainly alleged possession, and still alleges possession, we think that as soon as any part of that land is found to be *de facto* in the possession of other persons against whom a suit is brought, the case must necessarily fall under Article 142, and not under Article 144. It is quite clear from the wording of those Articles that every suit for possession of immovable property in which the plaintiff alleges that he has had possession must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within twelve years of the date of the suit. The learned Judge below has found, and the finding is a finding of fact, that the plaintiff has not proved his possession within twelve years of suit of the land in the present actual possession of the defendants 2 and 3. Indeed the learned Judge has gone much further, and upon the evidence appears to have found that these defendants have satisfactorily proved adverse possession for more than twelve years before suit. It would not, therefore, be a matter of much importance now under which Article of the Limitation Act this suit falls to be classed. Under either Article we are bound by the findings of fact of the learned Judge of first appeal, and those findings sufficiently dispose of the plaintiff's case. We must, therefore, dismiss this appeal with all costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Hayward.

CHANMALSWAMI GURU RUDRASWAMI RUDRAXIMATH AND ANOTHER
(ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, v. GANGADHARAPPA
ALIAS SUGAPPA BIN BASLINGAPPA ALAGUNDAGI AND OTHERS
(ORIGINAL PLAINTIFFS), RESPONDENTS.*

1914.

June 30,

October 15.

*Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—
Appeal—Decision that suit not barred as caste question.*

A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of section 97 of the Civil Procedure Code (Act V of 1908).

Sidhanath Dhondker v. Ganesh Govind⁽¹⁾ overruled.

Narayan Balkrishna v. Gopal Jiv Ghadi⁽²⁾ dissented from.

SECOND appeal against the decision of E. H. Legatt, District Judge of Dharwar, reversing the decree of V. V. Kalyanpurkar, Subordinate Judge of Hubli.

The plaintiffs sued for an injunction restraining defendants 1 and 2 from worshipping defendants 3 and 4 in the Rudraximath and its yard, for an injunction restraining defendant 3 from entering upon the premises of the math and parading in a Palkhi in a dress assuming the symbols of Parashiva and to restrain defendant 4 from worshipping the tomb in the math.

The defendants contended *inter alia* that the Civil Court had no jurisdiction to try the suit as it involved a caste question.

The Subordinate Judge found on the preliminary issue that his Court had jurisdiction to try the suit notwithstanding the fact that the question whether the

* Second Appeal No. 586 of 1912.

(1) (1912) 37 Bom. 60.

(2) (1914) 38 Bom. 392.

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acts complained of constitute pollution or not may depend entirely on the decision of questions as to religious tenets and rites.

The said finding having been embodied in a decree the defendants appealed and the respondents-plaintiffs took the preliminary objection that no appeal lay. The District Judge allowed the preliminary objection and dismissed the appeal. The following were some of his reasons :—

A "Decree" means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it is expressly enacted that an order of dismissal for default is not a decree.

Now the order that the Court has jurisdiction certainly determines the question whether plaintiff can bring the suit, but is that matter in controversy *in the suit*? I think it is not. It is a matter which must be considered and decided before the suit is begun. If the decision be that the suit will lie the Court will then proceed to hear the suit, if it be that the suit will not lie the Court will then proceed to dismiss the suit. In neither case will there be any appeal from the decision that the suit will or will not lie, for in neither case is that a matter in controversy in the suit. But when the consequence of the decision is that the suit is dismissed there is a refusal to grant to plaintiff the relief which he seeks in the suit and therefore an adjudication on a matter which is in controversy in the suit, namely plaintiff's right to relief. I think it follows from this that when the suit is disposed of on a preliminary point an appeal will lie from the decree dismissing the suit, but when the suit is not disposed of but merely proceeds no appeal will lie from the order on the preliminary point.

I know only of two cases which deal directly with this point since the new Code of Civil Procedure, 1908, came into force. In *Krishnaji v. Maruti* (12 Bom. L. R. p. 762) it was held that the formal expression of an order that the plaintiffs are agriculturists is a decree. The decision did not then dispose of the suit, but as the question was clearly a matter in controversy *in the suit* that ruling does not apply. Unless the suit is to proceed it does not matter in the least whether the plaintiffs are agriculturists or not.

In *Orr v. Chidambaram Chettiar* (I. L. R. 33 Mad. p. 220) an order dismissing an inter-pleader suit as not sustainable was held to be a decree. That ruling was under the old Code and so also does not apply: but I think that the

formal expression of such an order would still be a decree, though the formal expression of such an order that the suit was sustainable would not be a decree.

In the present case the decision of the lower Court was that it had jurisdiction and that the suit would lie. In my view this is not a matter in controversy *in the suit* and therefore the formal expression of that order is not a decree. It is not suggested that an appeal will lie from it as an order.

Orders refusing to set aside an order of dismissal for default or on failure to furnish security for costs, etc., are now made appealable as orders under Order XLIII, Rule 1, and the question no longer arises with regard to them.

In the present case I must hold that no appeal lies.

Defendants 1 and 2 preferred a second appeal.

The second appeal was originally heard by a Division Bench consisting of Beaman and Hayward JJ., who, in referring the question involved in the case to the decision of a Full Bench, delivered the following judgments :—

BEAMAN, J. :—We think that in the present state of the authorities, the general question, what is and what is not a preliminary decree, needs to be considered by a Full Bench. We are sensible of the difficulty of stating the question in a sufficiently clear cut and definite form. But this Court appears to have held that decisions on various points are preliminary decrees, and we feel grave doubts not only whether the particular decisions are right, but much more, whether the reason underlying them is not capable of extension so as to cover a trial Court's ruling upon every disputed point arising during the trial. I find for example that I was myself a party to a ruling of this Court in *Sidhanath Dhonddev v. Ganesh Govind*⁽¹⁾ which certainly seems to have held that the finding of an original Court upon three points—(1) Misjoinder, (2) Limitation, (3) Jurisdiction—was in each case a preliminary decree. Upon further reflection, a careful

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examination of the cases bearing on the point, and the definition of decree in the Code, along with every section contained in the Code which can throw any light upon the subject, I am convinced that that decision is wrong, that it goes much too far, and that if such findings really are preliminary decrees, it would be virtually impossible to deny that any ruling as to whether a document tendered were admissible or not, or a question objected to, relevant, would also be a preliminary decree.

Scott, C.J., who delivered the judgment in *Sidhanath Dhonddev v. Ganesh Govind*⁽¹⁾ subsequently held in *Rachappa v. Shidappa*⁽²⁾ that a decision of this Court upon a question of jurisdiction was not a decree giving the parties aggrieved by it, a right of appeal to the Privy Council. These decisions certainly appear to be in conflict with each other.

Having regard to the definitions of a decree, and a preliminary decree in the Code of Civil Procedure, I have formed a very strong opinion that no finding by a trial Court upon such points as limitation, or jurisdiction, where that finding is in favour of the plaintiff, and permits the suit to proceed can, in any true sense, be a preliminary decree. It further seems that virtually every true preliminary decree is actually provided for in the Code itself. A comparison of these, with the class of findings I have just mentioned, brings out the radical distinction in principle between them with sufficient clearness. For my own part I would go even further, notwithstanding the current of authority in this Court, and doubt with all becoming respect, whether in suits under the Dekkhan Agriculturists' Relief Act a finding *in limine*, that a party is or is not an agriculturist within the meaning of the Act, is a

(1) (1912) 37 Bom. 60.

(2) Civ. App. No. 21 of 1913 (Un. Rep.).

preliminary decree. That is a more difficult case requiring a finer analysis. But in every such suit the plaintiff claims some concrete relief, he wants money or land, and a finding that he (or a defendant) is or is not an agriculturist does not conclusively determine any such right, but merely determines procedure, as a result of which the rights put in controversy will be settled and decreed. It is true that in many cases status alone may be decreed, and all such decrees are of course true decrees. But they are not preliminary. If the suit is for declaration of status, a decree conferring or refusing to confer that status concludes the suit, and leaves nothing more to be done.

But in suits under the Dekkhan Agriculturists' Relief Act, finding that a party is or is not an agriculturist, does not determine any of the substantial rights which the Court is asked to give or withhold. It is true that it is a matter in controversy, in respect of which the rights must be determined. But so is every detail of procedure, and rule of evidence, more or less directly. As I understand the definition it describes two things, (1) the legal rights of the parties which are to be decreed or not decreed. These are in a vast majority of cases concrete, as a sum of money or piece of land or house, or some other form of real or personal property, (2) the said rights in respect of any or all the matters in controversy. This means, as I understand it, everything which is necessary in law, during the course of a trial, to the establishment or refutation of the alleged right. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as all the rules of procedure and evidence which have to be enforced and followed during the trial. But these latter are means to an end, and the end is the right or rights claimed, and to be, or not to be decreed. The far wider construction put upon the words in this

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Court is, in my opinion, uncalled for, and will lead in practice to the most disastrous consequences. The conduct of civil business is already slow enough, but how can it ever be finished if the trial Judge has to frame twenty preliminary "decrees" in the course of every trial and so open the door to twenty successive appeals before any decision on the merits has been given? Upon this subject I may be permitted to call attention to the weighty words of their Lordships of the Privy Council in *Maharajah Moheshur Sing v. The Bengal Government*⁽¹⁾. This is not a question of mere words, empty dialectic, but of great and far reaching practical importance. I believe that this Court stands alone in the extension it has given to the meaning of the term "preliminary decree", and in view of the steadily increasing number of appeals from what are called preliminary decrees, and may fairly be said to have been held to be preliminary decrees by this Court, and the resultant delays, expenses, and harassments to which suitors are being subjected, it is very desirable that the whole question should be fully considered and authoritatively settled by a Full Bench.

HAYWARD, J. :—The plaintiffs sued defendants for an injunction in respect of certain religious ceremonies. The defendants raised a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of Civil Courts. The original Court held that the matters were within the jurisdiction of the Civil Courts. The District Court held on first appeal that this decision was not appealable at that stage as it did not amount to a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. This Court has been asked to hold on second appeal that the decision was a preliminary decree and subject as

⁽¹⁾ (1859) 7 Moo. I. A. 283 at p. 302.

such to appeal relying on the cases of *Krishnaji v. Maruti*⁽¹⁾ and *Sidhanath Dhonddev v. Ganesh Govind*⁽²⁾ in which it was held respectively that the decision as to the defendant being an agriculturist and the decisions as to misjoinder, limitation and jurisdiction were preliminary decrees inasmuch as they determined the rights of the parties with regard to matters in controversy in the suit within the meaning of section 2, Civil Procedure Code.

It has, however, been conceded that these decisions, if pressed to their logical conclusion, would cover all interlocutory orders passed in the suit, a result strongly condemned by the Privy Council in the following terms: "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting forever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities", in the case of *Maharajah Moheshur Sing v. The Bengal Government*⁽³⁾ under the old Civil Procedure Code. It has been further pointed out that it was held in *Rachappa v. Shidappa*⁽⁴⁾ under the present Civil Procedure Code, that a decision upon jurisdiction by the High Court had only the effect of regulating procedure

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(1) (1910) 12 Bom. L. R. 762.

(2) (1912) 37 Bom. 60.

(3) (1859) 7 Moo. I. A. 283 at p. 302.

(4) Civ. App. No. 21 of 1913 (Un. Rep.).

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and decided none of the rights of the parties for purposes of appeal to the Privy Council. It is necessary in all these circumstances to examine with particular care all the provisions relating to preliminary decrees contained in the present Civil Procedure Code before coming to the conclusion that a result so strongly condemned by the Privy Council has been intended by the Legislature.

No doubt such a result might be deduced from a literal interpretation of the words of the definition "‘decree’ means the formal expression of an adjudication which.....determines the rights of the parties with regard to all or any of the matters in controversy in the suit" and of the explanation "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit" in section 2 (2). But it would appear that a limited interpretation was contemplated and that the adjudication determining the rights of the parties was meant to be an adjudication after a complete hearing of the case, because it has been provided that only after such a hearing should judgment be pronounced and be followed by decree by section 33. This has been made still clearer by the rules relating to the hearing of the suit. It has been provided that preliminary issues of law should be tried if those issues would *dispose of the suit* by Order XIV, Rule 2, and that if the finding should not be sufficient for the decision there should be a postponement of the hearing of the suit but that if the finding should be *sufficient for the decision* judgment should be pronounced, even though the hearing should not have been fixed for *the final disposal of the suit* by Order XV, Rule 3. It has been further provided that only after the case has been heard should there be judgment and that there should be a finding on each issue unless a finding on one or more issues should

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be *sufficient for the decision of the suit* and that the judgment should be the basis of the decree and that the relief granted *or other determination of the suit* should be clearly specified in the decree by Order XX, Rules 1, 5 and 6. The limited interpretation contemplated has been indicated with sufficient precision by the following rules which specify the cases in which preliminary decrees may or shall be passed in anticipation of the prescribed final decrees. These cases are administration suits, suits for dissolution of partnerships, account suits and suits for partition dealt with in Order XX, Rules 13, 15, 16 and 18. The only other preliminary and final decrees provided are those in mortgage suits under Order XXXIV. Special forms for these preliminary and final decrees have been prescribed in Appendix D, Nos. 3, 4 to 11, 17 to 20 and 22 of the 1st Schedule. It has then been provided that if a preliminary decree should not give satisfaction there must be an immediate appeal and that the questions thereby decided should not be open to dispute on appeal from the final decree by section 97. But it has been recognized that there well might be many interlocutory orders not appealable as orders under section 104 and not amounting to decrees which might seriously affect the final decision of the suit and it has been expressly provided that such orders should be open to consideration on appeal from the decrees by section 105, Civil Procedure Code. It appears to me incontrovertible in view of all these provisions that the limited interpretation indicated has throughout been contemplated and that the only preliminary decrees sanctioned have been exhaustively enumerated subject of course to extension by further rules lawfully framed and that in all other cases the final determination of the suits has been required before preparation of the decrees. This limited interpretation has moreover the merit of avoiding the evils so strongly

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condemned by the Privy Council and there would be a strong general presumption against any other interpretation out of respect for the Legislature.

This matter is of far reaching consequence to the administration of justice and should therefore in my opinion be referred for final decision by the Full Bench.

The point being thus referred it was argued before the Full Bench composed of Scott, C. J., Heaton, Macleod, Shah and Hayward JJ.

D. A. Khare, for the appellants (defendants 1 and 2):—The term “decree” is defined in the present Civil Procedure Code, 1908, as “the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.” It may be either preliminary or final. A decree is preliminary “when further proceedings have to be taken before the suit can be completely disposed of.” It is final “when such adjudication completely disposes of the suit.” This definition limits the point of decision to matters which determine the rights of the parties. Matters in controversy arise on the pleadings of the parties and are focussed in the issues raised.

It cannot be said that every preliminary decree gives a ground for appeal. But when there is a question of jurisdiction and the Court gives its decision on the question, there is a preliminary decree and appeal lies from it: *Sidhanath Dhonddev v. Ganesh Govind*⁽¹⁾, *Sakharam Vishram v. Sadashiv Balshet*⁽²⁾, *Kaluram Pirchand v. Gangaram Sakharam*⁽³⁾ and *Narayan Balkrishna v. Gopal Jiv Ghadi*⁽⁴⁾.

The Court should go only upon the definition of the term “decree” in section 2 of the Civil Procedure

(1) (1912) 37 Bom. 60.

(2) (1913) 37 Bom. 480.

(3) (1913) 38 Bom. 331.

(4) (1914) 38 Bom. 392.

Code. The enumeration of preliminary decrees in other sections and rules is not exhaustive. The section means that all rights, which are in contest between the parties and which are in controversy before the Court, when decided become the subjects of a decree. Compare section 109 of the Code which makes a distinction between "decree" and "final order". The term "decree" is not separately defined in the section as was done in the Code of 1882; but it obviously refers back to section 2.

The term "preliminary" must be construed with reference to the main definition. When the decision refers to *any* matters in suit, the decree is preliminary. It is final when it refers to *all* matters in suit.

Dhurandhar, with *G. S. Mulgavkar*, for the respondents (plaintiffs):—The distinction between a preliminary decree and a final decree is that the latter completely disposes of the suit, whilst the former only disposes of it partially.

[Scott, C. J. :—Do you contend that "rights of parties" means the whole bundle of rights?]

We mean the rights with regard to which the suit is brought. Every preliminary decree contemplates "further proceedings" before the suit is completely disposed of. This import of meaning is made clear by instances of preliminary decrees given in the Code. These instances are : (1) Administration Suits (Order XX, Rule 13, Appendix D, Form No. 17), (2) Suits for dissolution of partnership (Order XX, Rule 15, Appendix D, Form No. 21), (3) Account suits (Order XX, Rule 16), (4) Suits for partition (Order XX, Rule 18) and (5) Mortgage-suits (Order XXIV, Rule 2, Appendix D, Forms Nos. 3, 4, 5 to 9). In all these cases the Court, in the first instance, determines the rights of the parties and directs further proceedings to be taken. The Court stays

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its hands and awaits the result of those proceedings. The enumeration of preliminary decrees given in the Code is exhaustive: *Khadem Hossein v. Emdad Hossein*⁽¹⁾ which brought section 97 in the new Code.

The definition of "decree" as given in section 2 cannot be limited in any way. The decision in a case must be arrived at after the whole hearing of the case (section 33 of the Code) except when it can be reached on a preliminary question of law : Order XIV, Rule 2.

[Scott, C. J. :—Section 33 says what should be done under certain circumstances. It does not say what should be done in all cases. The question seems to be what is the meaning of "right", to what extent can "rights" be limited?]

The "rights" means substantial rights—rights with regard to which relief is sought.

[Scott, C. J. :—The Court has to consider "rights" with reference to "the matters in controversy."]

The definition of "decree" is in very wide terms. Some limitation should be placed on their meaning. What the limitation must be is indicated by the provisions of the Code : Order XV, Rule 3 ; Order XX, Rules 5, 6.

[Macleod, J. :—Can a judgment be a decree if it decides a suit one way and not be a decree if it decides the suit the other way?]

Yes, because in the former case the suit is decided, while it is not in the second case.

As to what orders are considered decrees, see *Bhikhaji Ramchandra v. Purshotam*⁽²⁾, *Subbayya v. Saminadayyar*⁽³⁾ and *Maharaja Dhiraj Maharana Shri Man-singji v. Mehta Hariharram Narharram*⁽⁴⁾.

(1) (1901) 29 Cal. 758.

(2) (1885) 10 Bom. 220.

(3) (1895) 18 Mad. 496.

(4) (1894) 19 Bom. 307.

Khare, in reply :—The words “the formal expression of an adjudication which conclusively determines the rights of the parties” include a decision on the point of jurisdiction. The word “right” includes the determination whether a particular Court should go into a claim or not and points to the right of a party to get relief from a particular Court.

[Heaton, J.:—The adjudication of a question of jurisdiction is not an adjudication on merits.]

The “rights” are not merits. They include both substantive rights and adjective rights. “Matters in controversy” refer to both questions of procedure and questions regarding which relief is claimed, in short, they refer to all matters which go to the root of the question.

[Shah, J. referred to *Bharat Indu v. Yakub Hasan*⁽¹⁾.]

C. A. V.

The judgment of the Full Bench was delivered by

SCOTT, C. J.:—The question arising in the suit in which this reference has been made is whether a decision in favour of the plaintiff upon a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of civil Courts, amounts to a preliminary decree from which the unsuccessful party must at once appeal by reason of section 97 of the Code, and the referring judgments call attention to *Sidhanath Dhonddev v. Ganesh Govind*⁽²⁾, in which it was held that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees. This Court is of opinion that the judgment in the last mentioned case was wrong and that such decisions are not preliminary decrees nor is the decision in the referred case a

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⁽¹⁾ (1913) 35 All. 159.

⁽²⁾ (1912) 37 Bom. 60.

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preliminary decree. We also think certain dicta in *Narayan Balkrishna v. Gopal Jiv Ghadi*⁽¹⁾, which are based upon *Sidhanath Dhonddev v. Ganesh Govind*⁽²⁾, go too far.

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(1) (1914) 38 Bom. 392.

(2) (1912) 37 Bom. 60.

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DATTAJIRAO ALIAS TATYASAHEB BIN SHIDHOJIRAO ALIAS ABASAHEB GHORPADE (ORIGINAL PLAINTIFF), APPELLANT, v. NILKANTRAO BIN SANTOJIRAO ALIAS BAPUSAHEB GHORPADE (ORIGINAL DEFENDANT), RESPONDENT.*

Pensions Act (XXIII of 1871), section 6—Saranjam—Grant of land revenue, Suit to recover—Collector's certificate—Admission of pleader binding on client—Preliminary decree—Appeal—Remand—Civil Procedure Code (Act V of 1908), Order XLI, Rule 23.

The grantee of a Saranjam filed a suit for the recovery thereof and at the trial a preliminary issue was raised as to the maintainability of the suit without the certificate provided for by section 6 of the Pensions Act. The grantee's pleader admitted a certificate was necessary but after several adjournments for the purpose failed to produce a certificate. A decree was thereupon passed on the preliminary issue dismissing the suit. On appeal by the grantee it was contended that he was not bound by the admission of the pleader and it was stated that such evidence could be produced as would render a certificate unnecessary.

Held, that the grantee was bound by the admission of his pleader and that even if he was not so bound there was no material before the Court to justify a reversal of the decree and therefore a remand under Order XLI, Rule 23 of the Civil Procedure Code (Act V of 1908) was impossible.

In the absence of evidence to the contrary the grant of a Saranjam must be presumed to be a grant of land revenue and not of the soil.

Ramchandra v. Venkatrao⁽¹⁾ and *Raja Bommadevara Venkata Narasimha Naidu v. Raja Bommadevara Bhashyakarlu Naidu*⁽²⁾, referred to.

* First Appeal No. 197 of 1913.

(1) (1882) 6 Bom. 598.

(2) (1902) L. R. 29 I. A. 76.

FIRST appeal against the decision of G. V. Patvardhan, First Class Subordinate Judge of Dharwar, in suit No. 20 of 1912.

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The plaintiff sued to recover possession of the lands in suit together with mesne and future profits alleging that his father Shidhojirao *alias* Abasaheb Ghorpade was the full owner of all the lands of two villages, namely, Jigeri and Irapur of taluka Ron and of a house at Gajendragad, that the two villages were Saranjam Inams, that the said property was the joint ancestral property of the plaintiff and his father who died on the 17th December 1899, that the property was jointly managed by the plaintiff and his father up to his death, that afterwards the plaintiff alone managed and enjoyed the property till about the month of June 1900 when the defendant's father illegally and without any right took possession of all the said property and was in enjoyment of it till he died about five years before the suit, that since then the defendant had been in enjoyment of the property and that the cause of action arose in the month of June 1900. The plaintiff further alleged that his father had bequeathed the property in suit to the plaintiff in the year 1890 but he had not based his suit merely on the right which had accrued to him under the said will, but he also relied upon his right by survivorship and also upon the right to which he was entitled as the son of his father. The plaintiff prayed that the Saranjam lands in the above mentioned two villages be given over to him from the defendant, that he should be awarded Rs. 3,000 as mesne profits for the past three years and payment of future profits be ordered at the rate of Rs. 1,000 a year. The plaint was presented on the 16th December 1911.

The defendant contended *inter alia* that the suit was not maintainable without the Collector's certificate under section 6 of the Pensions Act.

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On the defendant's contention the Subordinate Judge, on the 13th September 1912, framed a preliminary issue, namely:—

“ Whether the suit can lie without a certificate under the Pensions Act ? ”

The plaintiff's pleader agreed that a certificate was necessary and having asked for time to produce one, he ultimately failed to produce it after repeated adjournments and the suit was dismissed on the 1st April 1913.

The plaintiff appealed.

Nilkant Atmaram for the appellant (plaintiff).
Coyajee with *N. V. Gokhle* for the respondent (defendant).

SCOTT, C. J. :—The plaintiff alleged that one Shidhojirao was the full owner of all the lands in two villages, namely, Jigeri and Irapur of Ron Taluka, and one house at Gajendragad, that the two villages were Saranjam Inams, that the plaintiff's father died in 1899, that the plaintiff and his father were joint and the properties above-mentioned were managed and enjoyed jointly by them up to the death of the plaintiff's father, that afterwards up to about June 1900, the plaintiff alone managed and enjoyed the property, and about the month of June 1900, the father of the defendant, without having any right thereto, illegally took possession of all the land and was in enjoyment of it until five years ago when he died, and since then the defendant had been enjoying the property. The plaintiff further alleged that his father bequeathed the property in suit to him by will in the year 1890, but the plaintiff brought the suit not merely relying upon the right which accrued to him under the will but upon his right by his survivorship and as the son of Shidhojirao, and he prayed that the Saranjam lands in the two villages of Irapur and Jigeri should be given over by the defendant ; that mesne profits should be awarded, and further profits from the

date of suit until possession at the rate of Rs. 1,000 a year. The defendant by the sixth paragraph of his written statement pleaded that the suit was not maintainable without a certificate of the Collector under section 6 of the Pensions Act XXIII of 1871.

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On the 13th September 1912, a preliminary issue was raised in the trial Court as follows :—"Whether the suit can lie without a certificate under the Pensions Act?" On the 22nd of October 1912, the Court passed its decision upon that issue, giving as its reason that "Mr. Kambli for the plaintiff agrees that a certificate is necessary and wants time to produce it." Time, accordingly, in accordance with the practice of Civil Courts in this Presidency was given to the plaintiff's pleader. On the 1st April 1913 the learned Judge disposed of the suit upon the preliminary issue, saying "after repeated adjournments for the production of the certificate, the plaintiff's pleader now informs the Court that the Collector has refused to grant the certificate. He appears clearly to have refused the certificate on the strength of Government Notification No. 1455, dated the 10th February 1912, published in the *Bombay Government Gazette*, Part I, page 192. The plaintiff's pleader wants time to appeal to the Commissioner, but no such remedy is given to him by law. The suit is, therefore, dismissed with costs."

Now the plea raised by the sixth paragraph of the written statement was based upon the provision of the Pensions Act, section 4, that "no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government;" and the subsequent provision is that to which I have already alluded, contained in section 6, that a certificate by the Collector authorising to file the case must be produced. It is quite clear from the plaint that the plaintiff came

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to trial on the footing of the property which he seeks to recover being Saranjam, and it is equally clear that the plea contained in paragraph 6 of the written statement is based upon the established rule that, in the absence of evidence to the contrary, the grant of a Saranjam must be presumed to be a grant of land-revenue and not of the soil. That is laid down in *Ramchandra v. Venkatrao*⁽¹⁾, and reference is made in the judgment in that case to the definition by Professor Wilson in his Glossary of the term "Saranjam." He defines Saranjam as "temporary assignments of revenue from villages or lands for the support of troops, or for personal service, usually for the life of the grantee; also grants made to persons appointed to civil offices of the State to enable them to maintain their dignity. They were neither transferable, nor hereditary, and were held at the pleasure of the Sovereign." The judgment also quotes the statement of Mr. Steele in his "Hindu Castes" at page 207 that: "Grants by the Native Government in jaghir were either Fouj Saranjam, subject to the performance of military service, or Jat Saranjam, personal jaghir. The subject of those grants were the whole or particular portions of the revenues of villages belonging to the Sarkar Usually the grants depended on the pleasure of the Sovereign, and the fidelity of the grantee They were not, in general, hereditary."

There is, therefore, a strong presumption that the pleader for the plaintiff in agreeing that a certificate was necessary under the Pensions Act was taking a correct view of the position. But if that was not correct, it could only be shown to be incorrect by the production of evidence which would establish that the grant was not the usual grant of revenue but a grant of the soil. However, time was given for the production

(1) (1882) 6 Bom. 598.

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of the certificate, and the reason for the refusal of the certificate appears to have been the rule laid down in the Government Notification cited by the Subordinate Judge that certificates shall not be given in the case of Saranjams, probably because Saranjams are not ordinarily hereditary in the usual sense of the word, that is to say, they do not pass except with the consent of the Ruling Power to the heir of the holder.

The plaintiff, however, has appealed from the decision, and his pleader, as far as we can ascertain, without any materials whatever before him, has positively asserted that he could prove by evidence, if he were given the opportunity, that the grant in this case is a grant of the soil and not of the revenue. He says that, for the purpose of arguing the appeal, he cannot be concluded by the admission of the plaintiff's pleader in the lower Court, because an admission of a pleader on a point of law is not binding upon the client in appeal. Whether that is a correct statement in its unqualified form, where the admission is the direct cause of the dismissal of the suit, it is not necessary now to consider; for, upon the statement of the appellant's pleader and upon the authorities to which I have just referred, it is clear that the plaintiff could only succeed in showing that the suit could be maintained without a certificate, if he called evidence to displace the ordinary presumption regarding the nature of Saranjam grants; and where a pleader in the lower Court makes an admission upon an issue regarding which evidence might be but is not given, we have the authority of the Privy Council for holding that the client will be bound: see *Raja Bommadevara Venkata Narasimha Naidu v. Raja Bommadevara Bhashyakarlu Naidu*⁽¹⁾. Let us, however, assume that the appellant is not bound by the admission of the pleader in the lower Court, then we have before

(1) (1902) L. R. 29 I. A. 76.

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us an appeal where the lower Court has disposed of the suit upon a preliminary point. We cannot then remand the case under Order XLI, Rule 23, unless we reverse the decree in this appeal. But what materials have we to justify us in reversing the decree? The presumption based upon high authority is that the decree was perfectly right, but the appellant has come to this Court to have the decree set aside and the case remanded without a particle of documentary evidence, without any statement based upon affidavit, to induce us to hold that evidence is forthcoming which ought to have been produced in the lower Court in the interest of the plaintiff, and which would have been produced but for some grave error on the part of his pleader. We cannot presume that this is the case. We, therefore, hold that the decision of the lower Court was right. We dismiss the appeal with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

JAYERBHAI JORABHAI (ORIGINAL PLAINTIFF), APPELLANT, v. GORDHAN NARSI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Bhagdari and Narwadari Tenures Act (Bom. Act V of 1862), section 3—Unrecognised sub-division of a bhag—Mortgage—Covenant in the mortgage-deed—Claim for compensation based on covenant maintainable—Indian Contract Act (IX of 1872), section 65—Specific Relief Act (I of 1877), section 38—Mortgagor holding as tenant of mortgagee for upwards of twelve years—Adverse possession of limited interest.

In 1897, the house in suit and certain other properties were mortgaged to the plaintiff's father by the defendants they having purchased the properties from the bhagdar owner in 1893. In 1901, on accounts being taken, part

* Second Appeal No. 582 of 1913.

of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit. The deed of mortgage contained a covenant in the following terms :—

“ If there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced.” Ever since 1897 the defendants held the house as plaintiff's tenants under yearly rent-notes, the last of which was passed on 20th June 1908. At the termination of the last rent-note, that is in July 1909, the defendants refused to surrender possession to the plaintiff. On the 9th November 1910, the plaintiff sued to recover possession of the house or in the alternative Rs. 749 as compensation. The defendants contended that both the mortgage and rent-notes were void under the Bhagdari Act and that the suit was barred by limitation. The lower Courts upheld these contentions and dismissed the suit. The plaintiff having appealed :—

Held, (1) that the mortgage as well as the rent-notes were void under the provisions of Bhagdari Act, 1862 ;

(2) that, so far as the contract of mortgage was concerned, the consideration failed *ab initio*, and the money advanced by the plaintiff being money received by the defendants for the plaintiff's use, the suit to recover it was barred under Article 62 of the Limitation Act ;

(3) that, although the mortgage was void under the Bhagdari Act, it was open to the plaintiff to claim under the covenant contained in the mortgage-deed ;

(4) that the plaintiff's possession from February 1897 to July 1909 gave him an absolute title to the limited interest as mortgagee and so justified his claim under the covenant for compensation for disturbance ;

(5) that the claim under the covenant was within time for the breach of the covenant did not occur till 1909 when the defendants refused, on demand, to surrender possession.

SECOND appeal from the decision of Mohanrai Dolatrai, Subordinate Judge of Broach with appellate powers, confirming the decree passed by Karsandas Jeshingbhai Desai, Subordinate Judge of Jambusar.

Suit by a mortgagee for recovery of possession of a house mortgaged or in the alternative to recover the amount of the mortgage, namely Rs. 749, from the person and other property of the defendants.

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The plaintiff alleged that the house in suit and certain other properties were by a registered deed of 3rd February 1897 mortgaged to the plaintiff's father by the defendants 1 and 2 and Shankar Narsi, the deceased husband of defendant 3, these mortgagors having purchased the properties from the bhagdar owner in 1893; that in 1901, on accounts being taken, part of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit; that the defendants 1 and 2 and Shankar Narsi, or, after his death, his widow the 3rd defendant remained in possession of the house as plaintiff's tenants under yearly rent-notes; that the last such rent-note was passed in 1908; that the defendants refused to surrender possession; that even if the said mortgage be proved to be one relating to a separated portion of a *bhag*, still, by reason of twelve years having already elapsed since the original mortgage of 1897, the plaintiff had become owner of the right by adverse possession as mortgagee. It was further pleaded that in case the plaintiff should not be held entitled to recover possession, he was in any event entitled to a sum of Rs. 749 as compensation under a covenant contained in the deed of mortgage in following terms:—

If there should be any hindrance or obstruction concerning the house or if the house should be taken out of your possession then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced.

The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari Act, the house mortgaged being an unrecognised sub-division of a *bhag*; that the plaintiff took no interest in the property either under the mortgage or under the rent-note and that the suit was barred by limitation.

The Subordinate Judge held that the mortgage and rent-notes were void; that the possession by defendants of the house as plaintiff's tenants from 1897 did not give to the plaintiff statutory title to the mortgage interest in the house; and that the plaintiff's claim for compensation was barred by limitation. His grounds of decision were expressed as under :—

"I shall first deal with the question whether the mortgage-deeds (exhibits 8 and 22) are valid and operative in view of section 3 of Bhagdari Act and of the admitted fact that the sale-deed passed by the original bhagdar was void. It is manifest from what is shown above that plaintiff's mortgagors have been in adverse possession of the house in suit for over twelve years. They can therefore resist the claim of their vendor to possession of the house on the ground of invalidity of the sale under section 3 of the Bhagdari Act, on the strength of the ruling reported at page 1128 of 10 Bom. L. R., *Adam Umar Sale v. Bapu Bavaji*. The question therefore arises whether the right which plaintiff's mortgagors acquired subsequently to the passing of the deeds, exhibits 8 and 22, can or cannot be held to have occurred to plaintiff under section 18, clause (a) of the Specific Relief Act. If the mortgage was void on the ground that the mortgagor had no interest in the land mortgaged at the time of its execution, subsequent acquisition of interest in land or property mortgaged by mortgagors will be sufficient to give valid interest of mortgage to the mortgagee. In the present case the mortgagors have acquired a right to retain possession of the plaint house as against the original bhagdar vendor. Cannot the plaintiff claim to have acquired mortgaged interest in the right by virtue of his mortgage-deeds on the strength of the above said section of Specific Relief Act? Is there any difference in the title which a vendee acquires under a deed void by reason of failure of consideration in the form of absence of title in the vendor and that under a deed declared void by Bhagdari Act? In the case of a sale of any property by a person without a title, the vendor can, I think, be held to have conveyed a good title as soon as he acquires by adverse possession, cannot a similar title be held to have been conveyed by the present defendants? It is further to be noted that as against their vendor, the plaintiff's mortgagors could have claimed to retain possession so long as the compensation due to them was not paid by him. Cannot this claim pass to plaintiff? If it was open to me to decide these points, I would probably have decided them in plaintiff's favour but the ruling of our Bombay High Court reported at p. 693 of XI Bom. L. R., *Jijibhai Laldas v. Nagji Gulab*, decides that the alienation by a non-bhagdar of a portion of a bhag conveyed to him by a bhagdar, is invalid. * * * I, therefore, hold that both the mortgage-deeds, exhibits 8 and 22, are void under section 3 of Bhagdari Act."

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"The next point for determination, therefore, is whether the plaintiff's suit is barred by limitation. It will appear from the decision referred to above that compensation was awarded under section 65 of the Indian Contract Act as well as by virtue of the collateral agreement contained in the deed avoided. Section 65 enacts that when any agreement is discovered to be void, party who has received any advantage under such an agreement must return it to the party from whom it was received. Apparently, therefore, no claim for such a refund could be advanced unless the party advancing it comes to know or in other words discovers, that the transaction in which he paid the money or thing is void. In the present case I have held that plaintiff came to know of the allegation by defendants that the house appertains to *bhag*, only after the decision of Suit No. 563 of 1908. Can he be said to have legally discovered at that time only the defect in his title? In the case reported at p. 593 of I. L. R. 25 Bom., it has been held that when the contract of sale was void *ab initio*, the consideration for the sale must be deemed to have failed from the date of the contract, whether purchaser knew of the defect or not. The Privy Council case reported at page 123 of I. L. R. 19 Cal. was the basis of that decision. Similar principle was laid in the case reported at p. 750 of I. L. R. 26 Bom. These rulings govern the present case. * * * I, therefore, hold that the present suit not having been brought within three or six years from the date of the mortgage-deed in suit, is barred."

The plaintiff appealed, but the decree of the lower Court was confirmed by the District Judge.

The plaintiff preferred a second appeal.

D. A. Khare for the appellant (plaintiff) :—We submit that the title to an unrecognised sub-division of a *bhag* can be acquired by adverse possession : *Adam Umar v. Bapu Bawaji*⁽¹⁾. Here the defendants had acquired such title against their original vendor. As mortgagee from defendant, we had therefore acquired title by adverse possession of limited interest.

Further, we are entitled to recover compensation on the strength of the covenant mentioned in the mortgage-deed, and section 65 of the Contract Act favours such a view. The consideration cannot be said to have failed until the defendants refused to pass a rent-note.

⁽¹⁾ (1908) 33 Bom. 116.

Our suit is within time from such period : *Narsing Shivbakas v. Pachu Rambakas*⁽¹⁾.

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Again, the defendants are estopped by their having acknowledged our title as mortgagee : see section 43 of Transfer of Property Act.

G. N. Thakor for the respondents (defendants) :—We contend that an alienation of an unrecognised subdivision of *bhag* properties even by a non-bhagdar is void : *Jijibhai v. Nagji*⁽²⁾.

No question of adverse possession can arise here as the mortgage and the rent-notes were both void : *Laxmanlal v. Mulshankar*⁽³⁾, *Shridhar Ballkrishna v. Babaji Mula*⁽⁴⁾.

As to compensation, *Jijibhai v. Nagji*⁽²⁾ seems to be against us, but in that case no question of limitation arose as the suit was brought within two years of the date of alienation. Here the claim was barred as the mortgage was void *ab initio* and so the consideration for the mortgage failed on the date of the mortgage : *Hanuman Kamat v. Hanuman Mandur*⁽⁵⁾ ; *Ardesir v. Vajesing*⁽⁶⁾ ; *Tulsiram v. Murlidhar*⁽⁷⁾ ; *Narsing Shivbakas v. Pachu Rambakas*⁽¹⁾.

As to estoppel, there can be no estoppel against an act of the legislature. *Shridhar Ballkrishna v. Babaji Mula*⁽⁴⁾.

Khare, in reply.

BATCHELOR, J. :—The plaintiff, who is the appellant before us, brought this suit as mortgagee to recover possession of a house and Rs. 14 as rent or, in the alternative, to recover Rs. 749 from the mortgaged

(1) (1913) 37 Bom. 538.

(4) (1914) 38 Bom. 709.

(2) (1909) 11 Bom. L. R. 693.

(5) (1891) 19 Cal. 123.

(3) (1908) 32 Bom. 449 at p. 454.

(6) (1901) 25 Bom. 593.

(7) (1902) 26 Bom. 750.

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house and other properties of defendants in case the Court should hold that plaintiff's mortgage was void. The plaint set out that the house in suit and certain other properties were, by a registered deed of 1897, mortgaged to the plaintiff's father by defendants 1 and 2 and Shankar Narsi, the deceased husband of defendant 3, these mortgagors having purchased the properties from the *bhagdar* owner in 1893; that in 1901, on accounts being taken, part of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit; that the defendants 1 and 2 and Shankar Narsi, or, after his death, his widow, the third defendant, remained in possession of the house as plaintiff's tenants under yearly rent-notes; that the last such rent-note was passed in 1908; and that the defendants refused to surrender possession. It was further pleaded that, in case the plaintiff should not be held entitled to recover possession, he was in any event entitled, under a covenant contained in the deed of mortgage, to a sum of Rs. 749 as compensation, that being the sum due under the mortgage.

The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari Act, that the plaintiff took no interest in the property either under the mortgage or under the rent-notes, and that the suit was barred by limitation. On the material issues both the trial Court and the lower Court of Appeal have found that the mortgage and the leases were void *ab initio*, that the defendants were not estopped from raising this contention and that the plaintiff's claim to compensation was barred by limitation. On these findings, so far as concerns the house now in litigation, the suit was dismissed. From this dismissal the plaintiff brings the present appeal.

The property in suit being admittedly an unrecognised sub-division of a *bhag*, its alienation is prohibited by section 3 of the Bhagdari Act, 1862. The argument advanced in the lower Courts that this mortgage could be saved from the prohibition was not pressed before us, and *Jijibhai v. Nagji*⁽¹⁾ is authority for the view that the mortgage is void under the Act none the less because the original mortgagors were not *bhagdars*. The rent-notes were, we think, part and parcel of the one indivisible transaction; they are, therefore, tainted with the illegality which affects the mortgage, and they must suffer the same fate. We hold that both the mortgage and the rent-notes are void.

The only remaining question is that to which the arguments before us were almost exclusively confined, namely, whether the plaintiff is entitled to any and what compensation. The lower Courts, following *Jijibhai's case*⁽¹⁾, have decided that the plaintiff has a good claim to compensation under section 65 of the Contract Act, but both Courts have felt compelled to hold that the claim is out of time, though the learned Subordinate Judges recognise the hardship of a decision which deprives the plaintiff both of his mortgage security and of the money which he advanced. It may be observed in passing that the hardship happens in this case to be all the greater because it is found that the plaintiff had no knowledge of the *bhag* character of the property until the decision of a former suit filed so late as 1908. But both the Courts have felt constrained to hold that, inasmuch as the contract of mortgage was void *ab initio*, the consideration must be taken to have failed from the date of the contract, that is, 1897, whether the plaintiff was aware of the illegality or not; for this view they have relied on *Ardesir v. Vajesing*⁽²⁾,

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⁽¹⁾ (1909) 11 Bom. L. R. 693.⁽²⁾ (1901) 25 Bom. 593.

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which followed the decision of the Privy Council in *Hanuman Kamat v. Hanuman Mandur*⁽¹⁾. It cannot be denied that if this view be sound and taking account of the whole of plaintiff's case, the claim for compensation is out of time. So far as the contract of mortgage is concerned, the consideration unquestionably failed *ab initio*, and the money advanced by the plaintiff's predecessor-in-title was money received by the defendants for the plaintiff's use, within the meaning of Article 62 of the Indian Limitation Act. Under that Article, therefore, the plaintiff is now too late to obtain compensation in respect of the consideration attaching to the mortgage.

But there still remains the question whether the plaintiff is not entitled to recover for breach of a separate covenant contained in the deed of mortgage. That covenant was passed by the defendant mortgagors in the following terms, "if there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced." Assuming for the moment, that this covenant can properly be made the basis of a claim for compensation independently of the original mortgage it is plain that that claim will be within time, for the plaintiff's case is that the breach of the covenant did not occur till 1909 when, the term of the last lease having expired, the defendants refused, on demand made, to surrender possession and the suit was filed in 1910. We may notice also that this covenant is of a different character from that which, in *Ardesir's case*, was held incapable of saving the plaintiff's suit from the bar of limitation. For there neither the plaintiff

(1) (1891) 19 Cal. 123.

nor his vendor had possession of the *wanta* land in suit, and the covenant, it was held, did not amount to an agreement to compensate the purchaser for non-possession, but proceeded on the assumption that he had obtained possession. Here the covenant covers as well the cases where hindrance or obstruction should occur in taking possession as the case where possession, after having once been obtained, is afterwards taken away from the purchaser.

It remains to determine whether, although the mortgage is void under the Bhagdari Act, it is open to the plaintiff to claim under this covenant. It has not been suggested that in the Indian Contract Act or any other Indian enactment there is anything to prohibit such a claim; and the only provision which has any bearing upon the question of its validity, namely section 65 of the Contract Act, favours the view that the defendants are bound to make restitution. Having regard, however, to the precise wording of section 65, there may perhaps be difficulty in holding that this section is directly applicable to our present facts, but the section at least indicates that the plaintiff's claim is consonant with the general principle adopted by the statute. Assuming that the plaintiff's claim under the covenant cannot be wholly justified by reference to section 65, it follows that the point under discussion is not covered by any Indian enactment. That being so, it is competent to us to turn for guidance to the decisions of the English Courts on a similar state of facts. In *Kerrison v. Cole*⁽¹⁾ the plaintiff sued upon a bill of sale transferring to him the property in certain ships by way of mortgage security for a sum of £2,500 advanced by the plaintiff. But the bill of sale itself was void under a particular statute inasmuch as it did not recite the certificates of registry. Yet it was held that the plaintiff was entitled to sue the mortgagor upon his

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(1) (1807) 8 East. 231.

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personal covenant, contained in the same instrument of mortgage, for the repayment of the money. For the defendants it was contended that the whole instrument was void, and Counsel relied upon the comprehensive words of the statute which were that "the Bill or other instrument of sale shall be utterly null and void to all intents and purposes," arguing that the suit was an attempt to make the instrument good to one intent and purpose. The Court, however, held that the statute was not to be construed thus harshly, and Lord Ellenborough, C. J., after observing that in terms the statute purported to vacate only the bill of sale, said "It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties; but that part of it only which operates as a bill of sale.....To go farther, and vacate the covenant for the payment of the money lent, would be going beyond the reason and object of the Legislature in order to work injustice." And Le Blanc, J. said: "The object of the Act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships, for want of the requisites in the bill of sale: and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further." The words which we have quoted seem to us to be apposite to the present case. The Bhagdari Act, like the English statute, has for its object to enforce a political regulation, the preamble setting forth that the permanence of this superior tenure is endangered by the practice of attachment and sale, by civil process, of the homesteads and buildings appertaining to the *bhags*, and that it is desirable to prevent the alienation of any unrecognised portion of a *bhag*. But, as in the English case, there is nothing immoral in such alienations *per se*; for political reasons they are prohibited by law. And as the

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English statute, in the words of Lord Ellenborough, vacated only the bill of sale itself, and not any other independent contract which might be contained in the instrument, so section 3 of the Bhagdari Act provides only that it shall not be lawful (*inter alia*) to alienate or mortgage any unrecognised sub-division of a *bhag*, that any such alienation or mortgage shall be null and void, and that the Collector may remove from possession any such alienee or mortgagee who is in possession in violation of the section. It is, in the present case, the mortgage only that is to be avoided, and, following the language of Le Blanc, J., we may say that the object of the Act is effectually attained by avoiding the mortgage and, there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further so as to enable the mortgagor both to recover possession of the security and to retain the moneys advanced. *Kerrison v. Cole*⁽¹⁾ was followed in *Payne v. Mayor of Brecon*⁽²⁾, where *Mouys v. Leake*⁽³⁾ was also relied on. This latter case was concerned with the grant of a rent-charge created by a rector out of his benefice, such charge being absolutely void under the statute 13, Eliz. c. 20. But as the deed of grant contained a covenant by the rector personally to pay the charge, the Court refused to order the deed to be delivered up for cancellation, and held the covenant to be valid. The grounds upon which Lord Kenyon, C. J. put the judgment of the Court were stated in the following words, which appear to us applicable to the present appeal: "In this case," said his Lordship, "one of the defendants executed a deed, by which he granted an annuity or rent-charge out of certain benefices. This is not *malum in se*. There is nothing wrong in such a transaction, except as far as it

(1) (1807) 8 East. 231.

(2) (1858) 3 H. & N. 572.

(3) (1799) 8 T. R. 411.

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is prohibited by the statute. If indeed there had been any moral turpitude mixed in it, I would have followed it in all its consequences : but a deed that was intended to operate one way, may operate another way, *ut res magis valeat quam pereat*, if honesty requires it." It seems, therefore, to be clear that where, as here, the covenant is collateral and not merely dependent upon the principal contract, it may, in such circumstances as these, form the proper basis of a claim, even though the main contract be, as here, wholly null and void by statute. It appears necessary to explain that this is so in conformity with the authorities cited, because in *Payne v. Mayor of Brecon*⁽¹⁾ Baron Bramwell, as he then was, used language which might seem to cast doubt on the proposition that the covenant might be good even though the alienation might be wholly void by statute. We do not think, however, that the language used was really intended so to decide a question which was not then strictly before the Court, because the learned Judge himself quoted with approval the decision in *Kerrison's case*, where the mortgage of the ships was void by statute, and Watson, B. relied upon Lord Kenyon's judgment in *Mouys v. Leake*⁽²⁾, where the grant of the rent charge was void by statute. The most, therefore, that defendant's counsel can now make of *Payne v. Mayor of Brecon*⁽¹⁾, is to say that it was not so strong a case as either of the other two, and that the Court decided the case they had before them ; but in so doing, they expressly approved the decisions in *Mouys v. Leake*⁽²⁾ and *Kerrison v. Cole*⁽³⁾. For the rest it is only necessary to add that in *Payne's case*⁽¹⁾ the Municipal Corporation of Brecon had borrowed money for a purpose to which the borough fund was not applicable by section 92 of 5 and 6 Will. 4, c. 76, and

⁽¹⁾ (1858) 3 H. & N. 572.

⁽²⁾ (1799) 8 T. R. 411.

⁽³⁾ (1807) 8 East 231.

had, as security, executed a deed of mortgage without the approbation of the Lords of the Treasury, as required by section 94 of the Act. The mortgage was consequently invalid, but the deed contained a covenant to repay the borrowed money, and it was held that this covenant was valid. The judgment of the Court was, as we have said, based upon the cases of *Mouys v. Leake*⁽¹⁾ and *Kerrison v. Cole*⁽²⁾ as to which Watson, B. said "Those cases are founded on good sense and are sound law, and it would be mischievous to disturb them." That being so, it cannot, we think, be fairly said that in *Payne's case*⁽³⁾ the Court decided for the validity of the covenant merely because the mortgage executed by the corporation was only invalid, and not wholly void by the statute. Apart from the general reliance on the authority of the cases of *Mouys v. Leake*⁽¹⁾ and *Kerrison v. Cole*⁽²⁾, the *ratio* of the decision in *Payne's case*⁽³⁾ was, in the words of Martin, B., that there was nothing in the statute of Will. IV which prohibited a corporation from entering into a covenant to pay its lawful debts. We find that there is nothing to that purpose in the Bhagdari Act, and that, though the transfer by way of mortgage must be set aside as void under the statute, the English authorities show, consistently with the principles embodied in section 65 of the Indian Contract Act and section 38 of the Specific Relief Act, that the plaintiff is entitled to claim under the covenant.

Now the covenant promises compensation in the event of the disturbance of possession, and the plaintiff's case upon this point is put in this way. The first mortgage was executed on 3rd February 1897, and covered the house now in suit together with certain other properties. By another mortgage of 1901, the house alone

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(1) (1799) 8 T. R. 411.

(2) (1807) 8 East 231.

(3) (1858) 3 H. & N. 572.

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was secured. The house was never redeemed from the mortgage of 1897, and the possession then transferred to the plaintiff was held by him continuously till July 1909, when it was first challenged by the defendants. Throughout this period, the defendants passed annual rent-notes to the plaintiff, and, consequently, held as the plaintiff's tenants. The last of such rent-notes was passed on 20th June 1908, and it was not till after the expiry of this rent-note, that is July 1909, that the defendants, upon demand made, refused to surrender possession. The period from February 1897 to July 1909 exceeds the twelve years prescribed by the statute, and the plaintiff relies upon his possession throughout that period as giving him an absolute title to the limited interest and so justifying his claim under the covenant for compensation for disturbance. In our opinion this contention must be allowed. The mortgage and the rent-notes are void, but the plaintiff for over twelve years was in possession of the limited interest as mortgagee in possession and in assertion of that right held adversely to the defendants, who continuously attorned to him. As against the defendants the plaintiff's title to the limited interest had become absolute by July 1909, and it is now too late for the defendants to deny either the plaintiff's possession or their own disturbance of that possession in July 1909. If authority be needed for these conclusions, we may refer to *Adam Umar v. Bapu Bawaji*⁽¹⁾ as showing that possession held under an alienation void under the Bhagdari Act is adverse to the true owner, and to *Budesab v. Hanmanta*⁽²⁾ as showing that possession of a limited interest, equally with possession of the absolute interest, creates, when held adversely for the statutory period, an unimpeachable title.

⁽¹⁾ (1908) 33 Bom. 116.

⁽²⁾ (1896) 21 Bom. 509.

It follows that the plaintiff has a good claim for compensation under the covenant. But since the mortgage is void, the amount of the claim must, under the *Damdupat* rule, be limited to double the principal. There will therefore be a decree for the plaintiff for Rs. 400 with costs throughout and interest on judgment at 6 per cent. till realisation.

Decree varied.

J. G. R

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

VITHAL RAMKRISHNA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS,
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*Hindu Law—Mitakshara—Partition by grandsons—Paternal
 step-grandmother entitled to a share.*

According to the Mitakshara, the paternal step-grandmother is entitled to a share in the family estate when it is partitioned among her grandsons.

APPEAL from the decision of N. B. Majumdar, First Class Subordinate Judge of Dhulia.

Suit for partition.

The facts were that one Sitaram died leaving him surviving a son Ramkrishna by his first wife, and a widow Gangabai, his second wife. On Ramkrishna's death, two of his sons (plaintiffs) sued the other three (defendants) for partition of the family property.

The defendants contended *inter alia* that Gangabai (the paternal step-grandmother) was entitled to a share on partition of the property and was a necessary party to the suit.

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The Subordinate Judge held that Gangabai was not a necessary party to the suit, on the following grounds :—

Mitakshara which is the authority followed in this part of the country says in Chapter I, section 7, verse 1 :—" Let the mother also take an equal share." It makes no mention of the grandmother. Yajnyavalkya Smriti, which is considered as the principal Smriti on Hindu Law on this side of India, refers in Chapter II, verse 123, only to the mother and does not mention the grandmother. Mayukha in Chapter IV quotes several Smritics in support of the mother's right to a share, and all of them excepting that of Vyasa speak only of the mother and not of the grandmother. Vyasa alone refers to the grandmother. But the author of Mayukha does not say that it was customary in his time to give a share to the grandmother. In West and Buhler's Digest of Hindu Law, p. 780, and foot-note (c) on p. 824, grandmother is stated to be entitled to a share, but no authority is quoted and no case cited in support of that opinion. Mr. Gharpure, in his work on Hindu Law, first edition, p. 139, says :—" Except in Bengal a grandmother is not entitled to a share."

Mr. Mayne's Hindu Law, paragraphs 479 and 480, relied upon by the defendants' Vakil, speak of the law that is followed in Bengal, namely Dayabhaga. The law followed in Western India is discussed in paragraph 478, but the author mentions only the mother and the step-mother but not the grandmother. There is thus no authority for holding that Gangabai is entitled to a share. Therefore, she is not a necessary party.

The property was accordingly ordered to be partitioned between the plaintiffs and the defendants.

The defendants appealed to the High Court, contending *inter alia* that Gangabai was entitled to a share and was a necessary party to the suit.

Nadkarni, with *P. B. Shingne*, for the appellants :—
The right of the grandmother to a share on partition of the family property by the grandsons has been recognised by Vyasa and Brihaspati. The authority of Vyasa is acknowledged, for he has been cited frequently both in the Mitakshara and in the Mayukha. See also *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*⁽¹⁾; Jolly on Partition, page 54.

(1) (1856) 6 Moo. I. A. 393.

The Mayukha enlarges Vyasa's text and makes it to include "paternal step-grandmother": see Mandlik's Hindu Law, page 44. Madana, Madhava, Apararka, Shulapani and Ballambhatta all agree in giving an extended meaning to the term "*Mata*" (mother). See also Mandlik's Hindu Law, page 217: Jolly on Partition, pages 103, 137: Macnaghten, IV, 50. Even if the Mitakshara is silent on the point, the interpretation of Mayukha can be called in aid to supply the omission. See *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle*⁽¹⁾ and *Bai Kesserbai v. Hunsraj Morarji*.⁽²⁾

The grandmother is held entitled to a share on partition by the grandsons, under the Mitakshara (*Badri Roy v. Bhugwat Narain Dobey*⁽³⁾) and under the Bengal School: *Purna Chandra Chakravarti v. Sarojini Debi*.⁽⁴⁾ The right has also been affirmed in the case of step-mother: see *Damodardas Manehlal v. Uttamram Manehlal*⁽⁵⁾ and *Damoodur Misser v. Senabutti Misrain*.⁽⁶⁾ In the former case the right of step-mother to a share is based on the text of Vyasa alone. By parity of reasoning, the grandmother should be regarded as having the right.

Gadgil, with *B. V. Desai*, for the respondents:—The present case is governed by the Mitakshara, which does not assign any share to the grandmother either expressly or by implication.

The text of Vyasa does not afford much help. It is difficult to ascertain its import in absence of context. All that the text means is that mothers and grandmothers are entitled to shares on partition as between themselves. See Ghose's Hindu Law, 2nd edition, page 289.

(1) (1892) 17 Bom. 114 at p. 118.

(2) (1906) 50 Bom. 431.

(3) (1882) 8 Cal. 649.

(4) (1904) 31 Cal. 1065.

(5) (1892) 17 Bom. 271.

(6) (1882) 8 Cal. 537.

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The text of Brihaspati does not afford any help. It is wrongly translated by Colebrooke. The expression "*Samansha Matarastesham*" is translated as "his mothers (*Matarah*) take the same share." The word "his" is said to refer to "father"; and thus the word *Matarah* is taken as referring to "father's mothers" or grandmothers. There is no word corresponding to "his" in the original text. The word "tesham" means "their" and not "his." It must refer to sons. So regarded the text means that "mothers having sons and those that are sonless (step-mothers) are declared to be equal sharers." See also Vivada Chintamani, Tagore's edition, page 240.

The step-mother was recognised as entitled to share not on the authority of Vyasa's text; but on the express provision in verses 115 and 123 of Yajnyavalkya's Smriti. See also Mitakshara's commentary on verses 135 and 136 of Yajnyavalkya. The authority of Vyasa has never been accepted by this Court. The decision in *Damodardas Maneklal v. Uttamram Maneklal*⁽¹⁾ rests primarily on the authority of the Mitakshara. See also *Jairam v. Nathu*⁽²⁾. The commentary of Ballambhatta is not accepted by this Court as authoritative: *Mulji Purshotum v. Cursandas Natha*⁽³⁾ and *Bhagwan v. Warubai*.⁽⁴⁾

The grandmother has not been given a share in any reported cases in this Presidency. Her right, therefore, even if it existed in the time of Vyasa, has now become obsolete.

The case of *Purna Chandra Chakravarti v. Sarojini Debi*⁽⁵⁾ is decided under the Dayabhaga School of Hindu Law. The cases of *Puddum Mookhee Dossee v. Rayee*

(1) (1892) 17 Bom. 271.

(3) (1900) 24 Bom. 563.

(2) (1906) 31 Bom. 54.

(4) (1908) 32 Bom. 300.

(5) (1904) 31 Cal. 1065.

Monee Dossee⁽¹⁾, *Radha Kishen Man v. Bachhaman*⁽²⁾ and *Sheo Narain v. Janki Prasad*⁽³⁾ are against the appellants. The cases of *Sibbosoondeery Dabia v. Bussoomutty Dabia*⁽⁴⁾ and *Badri Roy v. Bhugwat Narain Dobey*⁽⁵⁾ are distinguishable.

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SHAH, J.:—The interesting question of Hindu Law argued in this appeal arises out of the following facts:—One Sitaram died leaving a son Ramkrishna and a widow Gangabai, the step-mother of Ramkrishna. Ramkrishna died in 1892 leaving three sons Vithal, Vishnu and Pandharinath by his first wife, who is dead, and two sons—Pralhad and Dinanath by his second wife Bai Parvati, who is alive. Pralhad and Dinanath with their mother Parvati sued the other three sons of Ramkrishna for a partition of the family estate. Among other things the defendants urged that Gangabai—their grandmother—was entitled to a share of the property, that she was a necessary party to the suit, and that the property in suit was acquired by Sitaram.

The learned First Class Subordinate Judge of Dhulia held that the grandmother was not entitled to any share in the property according to Hindu Law, and accordingly disallowed the objection. He decided the other issues in the suit, and passed a decree for the partition of the estate in favour of the plaintiffs. It was held that Bai Parvati was entitled to an equal share with the sons of Ramkrishna. The defendants have appealed against the decree and renewed their objection that Gangabai is a necessary party to the suit, as she is entitled to a share in the property in suit according to Hindu Law.

(1) (1869) 12 W. R. 409.

(3) (1912) 34 All. 505.

(2) (1880) 3 All. 118.

(4) (1881) 7 Cal. 191

(5) (1882) 8 Cal. 649.

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We have had the point argued without going into the other questions arising in this appeal. The argument has proceeded on the footing that the property in suit is ancestral family property (*i. e.* it was ancestral in the hands of Ramkrishna), and I have considered the question of law on that basis. I say nothing as to whether the whole property in suit was ancestral in the hands of Ramkrishna in fact or not.

The question whether Gangabai is a necessary party or not depends upon the view we take of her right to a share in the family property. The point that arises is whether a step-grandmother is entitled to a share in the family estate when it is to be partitioned among her grandsons. It is a point of first impression so far as Western India is concerned. The parties are governed by the Mitakshara Law.

Mr. Nadkarni, for the appellant, argues that the word *mata* used in Yajnavalkya's text (II. 123) is illustrative of a class and is not restricted to the natural mother according to its literal meaning. He relies upon the text of Vyasa, which is translated in Mandlik's Hindu Law, at page 44, as follows :—"The sonless wives of the father are declared equal sharers ; and so are all paternal grandmothers declared equal to the mother". It is also urged by him that the author of the Vyavahara Mayukha is in favour of allowing a share to the grandmother in accordance with Vyasa's text, and that, in the absence of any indication to the contrary in the Mitakshara the Vyavahara Mayukha should be read as supplementing the Mitakshara on the point.

On behalf of the respondents it is argued by Mr. Gadgil that there is no reason to attach any weight to Vyasa's text and that Nilakantha does not express any opinion in favour of that text in the Vyavahara Mayukha. He further relies upon the circumstance that there is no reported case in which the right of a grandmother to a

share in the property on a partition among her grandsons is recognised in this Presidency, and argues that her right, if any, has been obsolete long since.

I have carefully considered these arguments, and though the point does not appear to me to be free from difficulty, I am of opinion that the grandmother is entitled to a share in the ancestral estate on a division thereof among her grandsons.

In the first place, Vijnanes'wara himself does not limit the word *mata* to a natural mother, but gives an extended meaning to it by including all the wives of the father (*i. e.* step-mothers also). This is clear from the words used by him in introducing this part of Yajnavalkya's text: see Mitakshara, Chapter I, section VII, para. 1—Stokes' Hindu Law Books, p. 397. That is how these words of Vijnanes'wara have been interpreted by this Court in determining the right of a step-mother to a share in the estate on a division thereof among the sons. I am not unmindful of the alternative reading, which substitutes the word *Matuh* (of mother) for the word *patnīnam* (of wives) in the latter part of the introductory words. But even the use of the word *Matuh* there would make no difference in the meaning which Vijnanes'wara otherwise indicates fairly clearly.

Then comes the text of Vyasa the meaning of which is clear, and upon which the appellants naturally rely. The question is not about the meaning of the verse but about the effect to be given to it. Vijnanes'wara in his commentary on verses Nos. 4 and 5 of Yajnavalkya in the Achara Adhyaya points out generally the authority of the Smriti writers, and says that as each of the Smritis is authoritative, the points not mentioned in one may be supplied from the others, but if one contradicts the other there is an option. (एतेषां प्रत्येकं प्रामाण्येऽपि साक्षाद्व्यासाकाङ्क्षा परिपूरणमन्यतःक्रियते। विरोधे तु विकल्पः ॥) I have

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stated the rule enunciated by Vijnanes'wara with the substance thereof in my own words. Yajnavalkya is silent as to the right of a grandmother, and it seems to me that Vyasa's text can be used to supplement Yajnavalkya's Smriti. Vyasa is unquestionably a Smriti-writer of authority and though we have not the advantage of reading his verse with reference to the context in the original Smriti, the full text of which is not available, there can be no doubt about the verse, which is quoted by other commentators. I do not consider it any strained application of the rule laid down by Vijnanes'wara to give effect to Vyasa's text as supplementing the rules laid down by Yajnavalkya. It seems to me that taking the Mitakshara by itself with the text of Vyasa it is difficult to say that Vijnanes'wara would not allow a share to the grandmother.

This conclusion seems to fit in with the scheme of the Yajnavalkya Smriti on this point. The wives get shares if the division takes place during their husband's life-time, they become entitled to shares equally with their sons, if the division takes place after their husband's death under verses 115 and 123 of the Vyavahara Adhyaya of Yajnavalkya, and there is nothing unreasonable or incongruous in their obtaining shares equally with their grandsons if the division happens to be effected by their grandsons.

It may be mentioned that the view, which I take of the Mitakshara on this point, is by no means singular. A commentator like Apararka on the Yajnavalkya Smriti comes to the conclusion that the word *mata* is to be taken as indicating step-mother and others and quotes Vyasa's text in support thereof: see Anandashrama Sanskrit Series, Vol. 46, p. 730. In the Balambhatti, which is a commentary on the Mitakshara, the same view as to a grandmother's right to a share is accepted.

I refer to these works as showing merely that the view I take of the Mitakshara is a reasonably possible view and not as suggesting that they ought to form a basis for adopting that view. In Bengal the same conclusion as to the right of the grandmother to a share under the Mitakshara is accepted; see *Badri Roy v. Bhugwat Narain Dobey*⁽¹⁾.

The fact, however, remains that Vijnanes'wara is silent as to the right of the grandmother. In such a case we can and must invoke the aid of the Vyavahara Mayukha and try to harmonise it with the Mitakshara if and so far as it may be reasonably possible to do so.

This brings me to the Vyavahara Mayukha. On a careful perusal of Chapter IV, section IV, paragraphs 18 and 19 (Stokes' Hindu Law Books at page 52 or Mandlik's Hindu Law at page 44), it is clear that Nilakantha brings in the step-mother and the grandmothers on the authority of Vyasa's text. I am unable to accept the suggestion made on behalf of the respondents that Nilakantha simply quotes the text of Vyasa but expresses no opinion of his own. The verse is introduced to point out the share of the step-mother and the grandmother, and at the end the author says that by the word *sarvah* (all) even paternal step-grandmothers are included. It is true that Nilakantha does not in terms indicate his approval of Vyasa's rule; but I think it is clear from the context that he favours Vyasa's view, and apparently quotes Vyasa to justify the inclusion of step-mothers and grandmothers. At least it is safe to say that Nilakantha does not bring in the step-mother except under the authority of Vyasa, and to that extent Nilakantha has been understood by this Court as confirming the Mitakshara view in the case of *Damodardas Maneklal v. Uttamram Maneklal*⁽²⁾. I consider

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it reasonably possible to harmonise the Mayukha and the Mitakshara on this point and I think that ought to be done.

The only argument of some weight that remains to be noticed is that the right of the grandmother is obsolete. This argument is based upon the absence of any reported case recognising the right of the grandmother. This argument was used when the question as to the step-mother's right to an equal share with the sons came to be considered for the first time. Sir Charles Sargent, C. J., however, rejected it, and it seems to me that his observations on this point in the case of *Damodardas Maneklal v. Uttamram Maneklal*⁽¹⁾ apply with greater force to the case of a grandmother. In Western India the right of a mother to a share on a partition after the death of the father is not treated as obsolete, and I see no reason to suppose that the right of the grandmother is any more obsolete than that of the mother. I am unable to see any valid reason for refusing to recognise the one while recognising the other.

Mr. Gadgil has relied upon the case of *Sheo Narain v. Janki Prasad*⁽²⁾ in support of his argument. It is not necessary to examine the reasons given by the learned Judges in support of the conclusion they arrived at as they expressly declined to consider such a case as we have to decide. They observed as follows after referring to the text of Vyasa :—"Therefore, if in any case the grandmother would be given a share, it would be in the event of a partition between sons after the father's death. On this point we express no opinion, as the case before us is not one of partition after the father's demise."

It follows, therefore, that Gangabai, the step-grandmother, is entitled to a share in the family estate with

⁽¹⁾ (1892) 17 Bom. 271 at p. 287.

⁽²⁾ (1912) 34 All. 505.

her grandsons, and is a necessary party to the partition suit. The plaintiffs should be allowed to join her as a defendant now.

I do not wish to say anything as to the extent of her share, as the point is not argued, and as it is not desirable to deal with it in the absence of the grandmother. The determination of the extent of a grandmother's share may present difficulties according to the varying conditions, under which the partition may come to be effected. But, in my opinion, this is a simple case of its kind and need not present any difficulty.

The result, therefore, is that the decree of the lower Court is reversed and the case sent back to the lower Court for disposal according to law, after Gangabai has been joined as a defendant.

All costs to be costs in the suit.

HEATON, J. :—I agree.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE DAMODAR MOHOLAL GINNING AND MANUFACTURING COMPANY, LTD. (ORIGINAL OPPONENTS), APPLICANTS, *v.* NAGINDAS MAGANLAL (ORIGINAL PETITIONER), OPPONENT.*

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January 15.

Costs—Taxation—Application by a person for being registered as a shareholder in a Company—Indian Companies Act (VI of 1882), section 254—High Court Rules, Rule 704—High Court Manual of Circulars, Chapter VIII.

To regulate costs incurred in obtaining an order from the District Court to register the applicant as a share-holder of a Company, recourse must be had to the High Court Manual of Civil Circulars, 1912, Chapter VIII, and not to High Court Rules (Original Side), Rule 704 framed under section 254 of the Indian Companies Act (VI of 1882).

* Application No. 240 of 1914 under the extraordinary jurisdiction.

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APPLICATION under extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order passed by B. C. Kennedy, District Judge of Ahmedabad, in Miscellaneous Application No. 235 of 1913.

One Nagindas Maganlal applied to the District Court of Ahmedabad to obtain an order to register him as a share-holder of the Damodar Moholal Ginning and Manufacturing Company, Limited, at Ahmedabad and to rectify the register accordingly.

The application was allowed with costs.

The applicant drew up a bill of costs on the scale indicated in Rule 704 of the High Court Rules (Original Side). The District Judge allowed the bill on the above principle of taxation, on the following grounds :—

“I am of opinion that the High Court's Rules do authorise the charging of costs by pleaders at the rates prescribed by Rule 704 in respect of all proceedings under the Companies Act, even if such proceedings are taken in the District Court and this seems to be the practice of this Court.”

The Company applied to the High Court.

T. R. Desai, for the applicant :—Rule 704 applies only to proceedings in winding-up matters or matters relating to the reduction of capital or sub-division of shares : see section 254 of Act VI of 1882. Proceedings like the present are governed by Chapter VIII of the Manual of Circulars.

K. N. Koyajee, for the opponent :—Rule 704 is very wide in its terms and must be regarded as having been framed under section 15 of the High Court's Act. “Rules under the Indian Companies Act, 1882,” mean “Rules to be observed in matters under the Indian Companies Act, 1882.”

SCOTT, C. J. :—The opponent, in November 1913, applied by Miscellaneous Application No. 235 of 1913 to the District Judge of Ahmedabad for an order that

he should be registered as a share-holder in the Damodar Moholal Ginning and Manufacturing Company, and his application was allowed with costs. The pleader for the opponent, thereafter, presented a bill of costs prepared as if it were an Attorney's bill on the Original Side of the High Court, and that bill has been referred by the District Judge to the Taxing Master of this Court for taxation, the learned District Judge being of opinion that the High Court's Rules had authorized a charging of costs of pleaders at the rates specified by Rule 704 in respect of all proceedings under the Companies Act. It has been pointed out to us by the pleader for the applicant-Company that the power of the High Court to make rules specially relating to Company-applications is conferred by section 254 of the Indian Companies Act (VI of 1882), and that power is limited to making rules concerning the mode of proceeding to be had for winding up a Company, and for giving effect to the provisions contained as to the reduction of capital and the sub-division of the shares of the Company. If this proceeding does not fall under any of those categories, it could not have been a proceeding regulated by those rules made by the High Court under its powers under the Indian Companies Act. For the purpose of regulating the costs in other proceedings in Company matters, recourse must be had to rules framed by the High Court under its rule-making power under the High Courts Act. Those rules will be found in Chapter VIII of the Manual of Circulars of the Bombay High Court for the guidance of Civil Courts and Officers subordinate to it (edition of 1912). We set aside the order of the District Judge and remand the case to him for disposal on the question of costs. No costs on either side of this application.

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Order set aside.

J. G. R.

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BOMBAY COTTON MANUFACTURING COMPANY,
DEFENDANTS, v. MOTILAL SHIVLAL, PLAINTIFF.

[On appeal from the High Court of Judicature at Bombay.]

Appellate Court—Discretion of Appellate Court in the consideration of evidence—Interference with findings of fact of Judge who sees and hears the witnesses, rule as to—Pronouncement of Trial Judge as to credibility of witnesses not to be set aside on a mere calculation of probabilities by Court of Appeal—Relevancy of cross-examination to credit—Trial Judge's opinion on evidence upheld.

Whilst it is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appellate Court, it is, generally speaking, undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses, and has the opportunity of noting their demeanour, especially in cases where the issue is simple, and depends on the credit which attaches to one or other of conflicting witnesses. Nor should the pronouncement of the Trial Judge with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal.

In making these observations, their Lordships said they had no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wished to point out that where the issue is simple and straightforward, and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded.

Cross-examination to credit is necessarily irrelevant to any issue in the action; its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy. "It is most relevant in a case", their Lordships said, "like the present where everything depends on the Judge's belief or disbelief, in the witness's story: and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow."

On the evidence in the case their Lordships reversed the decision of the Appellate Court, and upheld that of the Trial Judge.

* *Present* :—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

APPEAL 17 of 1914 from a judgment and decree (5th February 1912) of the High Court of Bombay in its appellate jurisdiction, which reversed a judgment and decree (24th July 1911) of a Judge of the same Court sitting in the exercise of its original jurisdiction.

The only question for determination on this appeal was as to whether an item of Rs. 2,00,000 shown in the banking accounts between the appellant Company and the respondent, purporting to be an advance by the latter to the former by way of fixed deposit, was properly debited to the appellant Company.

The respondent was a Banker in Bombay carrying on a large business which was managed and conducted by his munim, Jeynarain Hindumal Dani.

The Agent and Managing Director of the appellant Company up to the time of his death in August 1909, was one Dwarkadas Dharamsey, who was also the Agent and Managing Director of two other companies in Bombay, the Tricumdas Mills Company, Limited, and the Lakhmidas Khimji Spinning and Weaving Company, Limited, both of which were in December 1908 hopelessly insolvent, while the appellant Company was perfectly solvent.

On 28th December 1908 the two insolvent companies were largely indebted to the respondent in respect of advances made by him through Dani (who was himself, and had been from 1905 a Director of the Tricumdas Company) at the instance of Dwarkadas Dharamsey.

There was then due to the respondent by the Tricumdas Company Rs. 1,50,000 on fixed deposit, and Rs. 1,40,000 on current account, and by the Lakhmidas Company on fixed deposit Rs. 1,50,000, and the same amount on current account.

On 26th December Dani suggested to Dwarkadas Dharamsey that the amounts due on current account

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by the two companies should be reduced, and they came to an arrangement to effect that result by shifting the indebtedness of the two companies for Rs. 2,00,000 on to the appellant Company, the respondent thereby having a solvent company instead of an insolvent one as security. No money was intended to pass, nor did any pass in this transaction; but two cheques for Rs. 85,000 and Rs. 1,15,000 were drawn by the Tricumdas and Lakhmidas Companies respectively on the Bank of Bombay in favour of the respondent. These cheques were sent to the cashier of the appellant Company, giving him at the same time instructions not to present them to be cashed by the Bank, and a receipt for Rs. 2,00,000 was given by Dwarkadas Dharamsey as the respondent's agent. Entries were then made in books of the three companies by which it was made to appear that the appellant had received Rs. 2,00,000 in cash from the respondent, the Tricumdas Company appeared to have repaid Rs. 85,000 to the respondent, and to have received Rs. 2,00,000 from the appellant, and the Lakhmidas Company was made to appear to have repaid Rs. 1,15,000 to the respondent, and to have received that sum from the Tricumdas Company. After these entries had been made the two cheques for Rs. 85,000 and Rs. 1,15,000 were destroyed by Dwarkadas Dharamsey without ever having been presented to the Bank for realization. The result of the entries was to make the respondent appear to be a creditor of the appellant Company for Rs. 2,00,000, and to be no longer a creditor of the Tricumdas and Lakhmidas Companies. No consideration whatever was received by the appellant Company in these transactions.

On 27th February 1909 the pretended fixed deposit of Rs. 2,00,000 was renewed by Dani and Dwarkadas Dharamsey for a further period of three months expiring on 27th May 1909, on which date a sum of

Rs. 2,00,000 was paid by Dwarkadas Dharamsey out of the moneys of the appellant Company to and was received by the respondent as being the repayment of the fixed deposit.

After the death of Dwarkadas Dharamsey the appellant Company was compelled to go into liquidation owing to the mismanagement of its affairs by its agent ; but subsequently the liquidation proceedings were withdrawn, its business was re-started under new agents, and the facts above stated were discovered in connection with the above transactions.

On 6th April 1910 the respondent brought against the appellant the suit out of which this appeal arose, claiming to recover the sum of Rs. 1,23,769-13-3 as the balance due to him on the accounts between them.

The appellant Company defended the suit, and contended that the item of Rs. 2,00,000 debited to it in the accounts was a fraudulent one, that it did not represent a real transaction, and that the appellant Company was not liable, as upon the accounts being properly taken there would be a balance due to the Company.

The first Court (Beaman J.) as to the nature of the transaction held that it was a fraud upon the appellant Company, to which the respondent's agent was a party, and of which he had full knowledge, that the appellant had received no consideration for the transaction, and was not estopped from raising the case of fraud upon the accounts ; and he ordered a reference to the attorneys of the parties to settle the accounts, and to find out how much was due on either side, after excluding the disputed debit item of Rs. 2,00,000 ; and eventually when the result of the reference was reported, he made a decree directing the respondent to pay to the appellant Company the sum of Rs. 1,17,633 with interest and costs.

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The material portion of the findings in the judgment as to the nature of the transaction, and as to the evidence of the witnesses on either side was as follows :—

“ These facts, upon which the defendant Company relies, are established, I think, beyond all reasonable doubt not only by the evidence most reluctantly given by the plaintiff himself under cross-examination, but finally and fatally, by the evidence of Dwarkadas Dharamsey's two sons, Devji Damodhar and Tricumdas Dwarkadas. Very seldom indeed has a party, in these Courts, such serviceable, clear-headed, and as it appears to me absolutely truthful witnesses as these two boys to offer in support of his case. The searching and destructive cross-examination of the plaintiff indeed could have left little doubt as to the true character not only of the man himself but of this transaction. Had any such doubt, however shadowy, remained, it must have been completely dispelled by the evidence of Devji Damodhar and Tricumdas Dwarkadas. And it is noteworthy, that the plaintiff made no serious attempt to shake these witnesses upon any material point of the story they had told. Indeed it was quite evident from their demeanour in the box that any such attempt would have been futile.

Thus then we find that in December 1908, a merely paper transaction was entered into with the object of shifting the plaintiff's security, from the Tricumdas and Lakhmidas Mills to the defendant Company. The evidence of Devji, and in a less degree of Tricumdas, proves most conclusively, that the whole of this transaction was entered into, not only, with the knowledge of, but at the suggestion and deliberate instigation of the plaintiff himself. At that time, as I have said, quite apart from this evidence, it is abundantly clear that he was pressing Dwarkadas Dharamsey for more and better security. Upon that part of the case, we have the evidence of the plaintiff himself, of Devji, and of Merwanji, a member of the firm of Bicknell, Merwanji and Romer, and the diary of the latter. The plaintiff attempted stoutly to maintain that he was not in the least anxious about the security he had for the loans he had made to the Tricumdas and the Lakhmidas Mills, but that as Dwarkadas Dharamsey was taking further loans as well for himself personally as for those Mills, the question of additional security had become important. Merwanji's diary is very significant upon this point. It contains an interpolation showing that the negotiation had reference not only to security for loans made to the Mills, but also for loans to be made *in futuro* to Dwarkadas Dharamsey personally. Now the interview appears to have occurred on the 26th December 1908, and Merwanji says that he dictated his notes 2 or 3 days later without the interpolation and as presumably therefore representing the predominant impression left on Merwanji's mind by that interview. The note entirely supports the defendant's contention, viz. :—that the plaintiff was desperately

anxious to obtain further and better security for the monies he had deposited with the Mills. But Merwanji says that Dwarkadas Dharamsey came to him personally and asked to have his note of interview. When the note was read, it was Dwarkadas who suggested making the interpolation. The materiality of this is, of course, to show why the plaintiff had recourse to this curiously involved transaction of the 28th December 1908. The foundation of the plaintiff's case is, that the plaintiff knew that his money in the Tricundas and the Lakhmidas Mills was very unsafe and desired to exchange his investment there at any rate partially and to the extent of these two lacs for the safe investment in the defendant Company. The plaintiff's case must necessarily largely depend upon the evidence given by the plaintiff himself, weighed against the evidence of the two sons of Dwarkadas for the defendant. I have already expressed the very high opinion I formed both of the truthfulness and clear-headedness of these two boys. Perhaps the less said about the quality of Dani's evidence the better. No one who reads it patiently from beginning to end could doubt that he is a thoroughly unscrupulous, untrustworthy and untruthful man. Yet this is not so apparent upon the paper record as it was while the witness himself was under cross-examination. He is of that class of men, so addicted, I presume, to tortuous and underhand dealings that he is literally afraid to give a plain answer to the simplest question. His examination occupied probably three times as long as it should have done owing to the witness' obstinate prevarication and attempts to fence with every question. It appears to me shocking that a man of such character, as Dani thus revealed himself in the witness box, is to be entrusted in a great commercial city like Bombay with the management of great concerns involving probably the fortunes of thousands of persons. Forming my opinion merely upon the witness' examination here and the facts which have come to light in connection with this dealing, I should say that he, and men like him, enter into and employ all the methods of Western commerce without having the faintest appreciation or sense of commercial honesty, which is usually supposed to underlie and be the basis of our commercial system. We have it, I say, not as a matter of inference, but on the direct and sworn testimony of witnesses who cannot be disbelieved, that the plaintiff himself suggested and insisted upon carrying out this fraud upon the defendant Company so that nothing is left really in uncertainty."

An appeal by the respondent was heard by an Appellate Bench of the High Court (Sir Basil Scott, C. J. and Russell, J.) who held that the appellant Company had failed to make out the case of fraud set up, and they accordingly made a decree for the respondent reversing the judgment appealed from.

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Scott, C. J. (after pointing out that "the defendant's success depends entirely on proof of a fraud between Dwarkadas Dharamsey and Dani, the onus being on the defendant," and submitting the whole of the evidence to a detailed examination) continued :—

"The defendants, however, contend that the transactions in question were in reality part of a fraudulent scheme by which Dani to save his master from loss foisted the liability of the debtor Companies on the defendant Company. If this was Dani's intention it is not clear why he did not withdraw the whole of the plaintiff's money lying on current account with the Tricumdas and Lakhmidas Companies and he continued from January to April to advance large sums to the Tricumdas Company on current account. In January 1909 its indebtedness to the plaintiff on current account increased by Rs. 25,000, in February by Rs. 85,000, in March by Rs. 34,000. In April the plaintiff advanced Rs. 1,30,000 and was paid Rs. 2,35,000. It was only in that month that for the first time in 1909 the payments by the plaintiff to the Company were not largely in excess of his receipts from it.

"The circumstances above detailed appear to us to be inconsistent with any fear on the part of Dani that his master would lose the money which was owing to him by the Tricumdas Company on the 27th of December and to afford no indication of any motive for the perpetration of the fraud attributed to him. Moreover the handing by his son of the two cheques of the debtor companies to the clerk of the defendant Company and the taking of an acknowledgment for the same from Parshotam Jeewandas seems absurd conduct if Dani was not prepared to fulfil his contracts of loans with the defendant Company and knew that the cheques he was handing over would not be honoured.

"The defendant's case does not however depend purely upon inferences to be drawn from the condition of the Tricumdas Company's accounts, for they produce a witness who gives direct evidence in support of the allegations of fraud on the part of Dani. This witness is Devji, the son of Dwarkadas Dharamsey. His story appears in the evidence on page 105 (read). The learned Judge has believed this story and disbelieved Dani's denial of any fraudulent suggestions on his part. He says 'These facts upon which the defendant Company relies are established, I think beyond all reasonable doubt, not only by the evidence most reluctantly given by the plaintiff (*i. e.*, Dani) himself under cross-examination, but finally and fatally by the evidence of Dwarkadas Dharamsey's two sons, Devji Damodhar and Tricumdas Dwarkadas. Very seldom indeed has a party in these Courts such serviceable, clear-headed and as it appears to me absolutely truthful witnesses as these two boys to offer in support of his case. The searching and destructive cross-

examination of the plaintiff indeed could have left little doubt as to the true character not only of the man himself but of this transaction. Had any such doubt, however shadowy, remained, it must have been completely dispelled by the evidence of Devji Damodhar and Tricumdas Dwarkadas and it is noteworthy that the plaintiff made no serious attempt to shake these witnesses on any material point of the story they had told'; and further on he says 'The evidence of Devji and in a less degree of Tricumdas proves most conclusively that the whole of this transaction was entered into not only with the knowledge of but at the suggestion and deliberate instigation of the plaintiff himself.' * * * 'We have it . . . on the direct and sworn testimony of witnesses who cannot be disbelieved that the plaintiff himself suggested and insisted upon carrying out this fraud upon the defendant Company so that nothing is left really in uncertainty.'

"This appreciation of the oral evidence has been subjected by the appellant's Counsel to various criticisms and in particular it has been pointed out that the learned Judge was in error in supposing that Tricumdas Dwarkadas gave any evidence relating to the transaction impugned. He only deposed to the taking of a bribe by Dani on a subsequent occasion which evidence was irrelevant and inadmissible, and to transactions in April and May 1908. This criticism appears to us to be sound. Tricumdas is not recorded to have given any evidence relating to the disputed transaction of the 28th of December. We will hereafter discuss the question of the relevancy of his evidence as to bribes. The oral evidence of the impugned transaction therefore resolves itself into assertion by Devji and denial by Dani with, as it seems to us, the probabilities strongly in favour of Dani's story. The onus is on the defendants to make out their case of fraud and we are unable to accept as conclusive the judgment of the lower Court as to the veracity of the defendant's witness. That Devji was a prepossessing witness and that Dani gave his evidence badly may be conceded without affecting our final conclusion. Dani came into the box knowing that he was charged with the commission of a fraud and was at once attacked in a searching cross-examination upon his weakest spot, the balance sheet of 1907, not a very relevant point in our opinion but a point upon which he was quickly placed in an uncomfortable position and reduced to shuffling answers. When however the story of the events of the 26th and 28th of December is reached his evidence on perusal seems straightforward and convincing enough."

Russell, J. concurred adding that "In my opinion the evidence of the witness Devji cannot and does not outweigh that afforded by the facts and probabilities and documents in the case which have been so fully dealt with in the judgment just delivered."

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Devji's evidence was considered by the Appellate Court to be inconsistent with certain established facts, and not to have been corroborated in regard to matters on which if it was true corroboration would have been possible, and for these and other reasons they declined to accept it as proof of the fraud alleged.

On this appeal,

Upjohn, K. C. and *A. M. Dunne*, for the appellants, contended that the transaction in question was a fraud upon the appellant Company, to which the respondent's agent was a party, and it was submitted that the transaction was without any consideration, and was *ultra vires*, invalid, and void. The sum of Rs. 2,00,000 which purported to have been dealt with in the transaction was not required or enjoyed by, or for the purposes of the appellant Company, its only use or purpose was to cover a pretended loan or advance by the appellant Company to two insolvent companies, and it was carried out solely for the benefit of the respondent, and in fraud of the appellant. The judgment of the Trial Judge, it was submitted, was correct, and in the conflict of opinion on the evidence, and as to the credibility of the witnesses, the decision of the Trial Judge who had seen and heard the witnesses was to be preferred to that of the appellate Court, formed greatly on inference and conjecture, and should be followed. Reference was made to *Khoo Sit Hoh v. Lim Thean Tong*⁽¹⁾; *The "Alice" and the "Princess Alice"*⁽²⁾; and *Montgomerie & Co., Limited v. Wallace-James*⁽³⁾. There was no rule to prevent the House of Lords from expressing their opinion on the evidence, even against concurrent judgments on facts.

⁽¹⁾ [1912] A. C. 323 at pp. 325, ⁽²⁾ (1868) L. R. 2 P. C. 245 at p. 252.

⁽³⁾ [1904] A. C. 73 at p. 76.

Sir R. Finlay, K. C. and *Kenworthy Brown*, for the respondent, contended that the Appellate Court had rightly held that no fraud had been established against the respondent or his agent; and that even if the fraud alleged had been proved with regard to the deposit receipt of 28th December 1908 for Rs. 2,00,000, the appellant Company would not, owing to their conduct before the suit as disclosed by the evidence, have been entitled at the date of suit to avoid the transaction impeached. Admitting that the opinion of the Judge, who has heard the witnesses, was entitled to great weight, this was, it was submitted, not a case to which the decisions in the cases cited for the appellant were applicable. Reference was made to the Evidence Act, sections 157 and 159, as to corroboration by witness of former testimony, and refreshing memory of witness.

The appellant was not called upon to reply.

1915 February 25th :—The judgment of their Lordships was delivered by

SIR GEORGE FARWELL :—This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August 1909, Agent and Managing Director of the appellant Company, and of two other Companies, the Tricumdas and the Lakhmidas; in 1908 the appellant Company was a flourishing and solvent Company, and the two other Companies were largely insolvent; and both were heavily indebted to the respondent for advances, to the amount of about 5½ lacs. The respondent was pressing

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Dwarkadas for further and better security in respect of these sums, and also of other monies advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant Company. This arrangement was carried out by entries which can only be characterised as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for Rs. 85,000, and one from the Lakhmidas Company for one lac and Rs. 15,000, and sent them over by his son to the office of the appellant Company, to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodhar telephoned to the cashier of that Company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as:—
“Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95500 S.S., and 1,15,000 cheque drawn on the Bank of Bombay bearing No. 7. 94950 S.S. No. 2.” The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation, except fraud. The transaction was merely a paper one for the purpose of shifting the respondent's security from the two insolvent to the one solvent company. The Judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's; he has stated that he has seldom seen in the box “such serviceable, clear-headed and absolutely truthful witnesses” as the two sons or a more “thoroughly unscrupulous, untrustworthy, and untruthful man”

than Dani, and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded.

With all respect to the Appellate tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of the two witnesses whom the Trial Judge in this case has believed to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, *e.g.*, that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lord-

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ships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers." The observation might be of disastrous effect if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the Judge's belief or disbelief in the witness's story, and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the Appeal Court be set aside and that of the High Court in its original jurisdiction be restored and that the respondent do pay the costs of this appeal.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Latteys & Hart.*

Appeal allowed.

J. V. W.

PRIVY COUNCIL.*

MOTABHOY MULLA ESSABHOY, DEFENDANT, v. MULJI HARIDAS,
PLAINTIFF.

P.C.^o

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[On appeal from the High Court of Judicature at Bombay.]

Evidence Act (I of 1872), section 92, and proviso (2)—Suit on promissory note—Plea of an oral agreement purporting to vary note—Admission in pleadings—Admission subject to condition—Absence of substantive proof of oral agreement—Onus of proof.

Although there are cases where it is allowable to urge an oral agreement which would have the effect of leaving matters otherwise than if they had depended on the written agreement alone, the oral agreement must be clearly proved, and the onus of doing so is on him who sets it up.

In a suit on a promissory note dated 23rd December 1907, executed by the defendant (appellant) and a firm of H. C. and payable on demand, the defendant pleaded that by an oral agreement between the parties his liability on the note was to cease on 30th January 1908, a simple acknowledgment by H. C. being then substituted for the note. The plaintiff stated in his plaint that the defendant's liability was only to come to an end at the date named provided he had then received full security for advances he had made to H. C., which were only partially secured. The parties went to trial and were allowed to give evidence, on which the Trial Judge in the High Court taking it as admitted that the defendant's liability ceased on 30th January 1908, and not accepting as proved the allegation of the plaintiff as to further security, decided in favour of the defendant, and dismissed the suit. The Appellate Court reversed that decision holding that evidence of the oral agreement was inadmissible under section 92 of the Evidence Act (I of 1872).

Held by the Judicial Committee that a mere amendment of the pleadings would have brought the defendant's contention within proviso (2) of section 92, as being an oral agreement as to which the promissory note "was silent, and which was not inconsistent with its terms." In that view their Lordships were of opinion that it would not be satisfactory to decide against the defendant without considering the evidence, and they held that the failure of the plaintiff to prove his version of the transaction did not necessarily (as held by the Trial Judge) imply that the defendant's case was

* *Present* :—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

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thereupon established. The agreement alleged by the defendant must be substantively proved, and that had not been done. It was permissible for a tribunal to accept part, and reject the rest of a witness' testimony; but an admission in pleading cannot be so treated, and if it be made subject to a condition it must either be accepted with the condition attached, or not accepted at all. An admission therefore that the note was to be held as satisfied on 30th January 1908 by a new debt on the part of H. C., provided that full security was found for the whole debt by that date, could not be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

APPEAL 40 of 1914 from a judgment and decree (8th October 1912) of the High Court at Bombay in its appellate jurisdiction, which reversed the decree (11th April 1912) of a Judge of the same Court in the exercise of its original civil jurisdiction.

The suit out of which this appeal arose was brought by the respondent on 5th December 1910 to recover from the appellant the sum of Rs. 50,000 with interest from that date upon a joint and several ~~promissory~~ note dated 23rd December 1907, and executed by the appellant and the firm of Hyderally Cassumji Sons and Company. The terms of the note were as follows:—

"Bombay, 23rd December 1907.

On demand we M. M. Essabhoy and Hyderally Cassumji Sons and Company, jointly and severally promise to pay to Mulji Haridas or order the sum of Rs. fifty thousand (50,000) for value received.

M. M. ESSABHOY.

HYDERALLY CASSUMJI SONS AND CO."

The execution of the note and the consideration for it were admitted by the appellant, but he set up a contemporaneous oral agreement by which his liability was, notwithstanding the express terms of the note, to cease on the 30th January 1908. This was denied by the respondent.

The main dispute between the parties was as to the circumstances under which the note was executed which were shortly as follows:—

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The firm of Hyderally Cassumji Sons and Company was in 1907 desirous of being appointed the Managing Agents of The Queen Spinning and Weaving Company, Limited, and with that view wished to acquire a sufficient number of shares in that Company to qualify the firm for the appointment; for which purpose the firm had borrowed Rs. 1,50,000 from the appellant; and also at the same time and for the same purpose had taken loans to a large extent from the respondent, and was then indebted to him in a sum of Rs. 4,00,000 as part security for which the partners in the firm had in addition to depositing with the respondent the title deeds of certain immoveable properties, agreed to assign to him a certain share of the commission to be earned in respect of the agency if it should be obtained by the firm of Hyderally Cassumji. In July that firm, in which the active partner was one Abdul Hussein Abdul Currim, with a view of paying off their debt to the appellant, applied to the respondent for a further loan of Rs. 1,50,000, which he eventually agreed to lend on the terms of a written agreement, dated 1st August 1907. The firm of Hyderally Cassumji then also (as alleged by the respondent) orally undertook to deposit with him certain other title deeds so as to fully secure him for the total sum of Rs. 5,50,000, and that such deposit was to be a condition precedent to the advance of the additional sum of Rs. 1,50,000. The respondent advanced one sum of Rs. 50,000 immediately after the date of that agreement, and another similar amount at the end of the month, both of which were paid over to the appellant. The balance, Rs. 50,000, it was arranged between Hyderally Cassumji and the respondent, should not be advanced until the end of January 1908; but in December 1907 the appellant being in difficulties for want of ready money, and there being a hundi for Rs. 50,000 which Hyderally Cassumji

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had endorsed for his accommodation, and which became due on 23rd December 1907, Abdul Hussein Abdul Currim, at the instance of the appellant, applied to the respondent, to advance the balance of Rs. 50,000 (though not due until the end of January) on that date; and this the respondent eventually agreed to do upon the appellant and the firm of Hyderally Cassumji executing the promissory note now in suit. The note was accordingly executed and made over to the respondent, and the sum of Rs. 50,000 was received by the appellant and applied by him in paying off the hundi.

Except the note the respondent obtained no security for the Rs. 50,000, and the firm of Hyderally Cassumji having, in November 1910, been adjudicated insolvent, filed the present suit against the appellant for recovery of the amount.

The plaintiff's case was that inasmuch as, at the time the advance of the amount (Rs. 50,000) was made and the note executed, he was not fully secured in respect of his previous advances to Hyderally Cassumji's firm (the additional title deeds promised not having been deposited), the understanding was that if full security was furnished to him by the firm before the end of January 1908 the defendant should be discharged from all liability on the note; but that as that condition had not been fulfilled the defendant's liability continued.

The defendant's contention was that his liability on the note was automatically to cease on 30th January 1908, the date on which according to him the sum of Rs. 50,000 was to have been, under the original arrangement, advanced by the plaintiff to Hyderally Cassumji's firm.

The suit was heard by Davar J. who accepted the account of the matter given by the defendant, and

holding that he had on the evidence discharged the onus which was upon him, and had proved the oral agreement alleged by him, dismissed the suit with costs.

An appeal by the plaintiff was heard by Sir Basil Scott C. J. and Chandavarkar J., who reversed the decree of Davar J. and gave the plaintiff a decree for the amount sued for with interest. The material portion of the judgment of the Appellate Court was as follows :—

“ The plaint in the suit stated certain circumstances under which the promissory note had been passed and in effect alleged an agreement between the parties under which if a certain condition was performed by Hyderalli Cassumji Sons and Company, the liability on the note would cease.

The defendant put in a written statement denying the allegation of the plaintiff as to the contemporaneous agreement. He alleged certain other circumstances under which the note had been issued and stated in paragraph 6 that it was agreed that the liability of the defendant on the said note should cease on the day on which the last of certain payments for Rs. 50,000 previously mentioned became due, that is on the 30th January 1908, the plaintiff, as above stated, having agreed to advance the money to pay the amount of the said instalment to the defendant on that day. That is an allegation of a contemporaneous oral agreement inconsistent with the terms of the promissory note, being an allegation of an agreement that although the note purports to be a note without any limitations payable upon demand, it is in effect a note, the liability on which is to cease on a particular date, the 30th January 1908, not subject to any condition depending upon human agency but merely on the expiration of a certain limited period of time, which is not mentioned in the promissory note. That, it appears to us, is an agreement which cannot be proved having regard to the terms of section 92 of the Evidence Act, and it is the only defence to the claim on the promissory note which is before the Court in this appeal.

The learned Judge has held that no agreement between the defendant and the plaintiff in the terms alleged in the written statement has been proved, but he comes to the conclusion that on the evidence the plaintiff is not entitled to succeed. The evidence has not been discussed before us except on behalf of the plaintiff commenting upon the judgment, but in our opinion any discussion of the evidence is unnecessary, because upon the face of the pleadings in support of which the evidence was adduced, no legal defence is forthcoming to the claim on the promissory note.”

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On this appeal,

Upjohn, K. C. and *E. B. Raikes*, for the appellant, contended that notwithstanding the terms of section 92 of the Evidence Act, it was open to the appellant to plead and prove his defence that by a separate contemporaneous oral agreement his liability on the promissory note was to cease on 30th January 1908. That would be, it was submitted, such an oral agreement as was referred to in proviso (2) of section 92, which formed one of the exceptions to the general terms of the section. It was admitted by the respondent in his plaint that a condition was attached to the execution of the note on the fulfilment of which condition the liability of the appellant on it was to cease. The condition alleged by the respondent to have been made, as to the giving of further security, was found by the Court of the Trial Judge not to have been proved; and that Court held that the appellant's account of the circumstances which preceded the execution of the promissory note was the correct one: but the admission as to the cessation of the appellant's liability held good. Reference was made to section 91 of the Evidence Act, it being contended that the words "the terms of a contract", meant "all the terms of a contract", whereas the promissory note related to payment only of the final instalment of the amount agreed to be paid: section 92, illustration (b), was also referred to [MR. AMEER ALI referred to *Bholanath Khettri v. Kaliprasad Agurwalla*⁽¹⁾]. The Court of appeal erred in making for the respondent a new case which he had never put forward. The judgment of the Trial Judge was, except so far as he had held the onus to be on the appellant, right both in law and fact.

⁽¹⁾ (1871) 8 Ben. L. R. 89. at p. 92.

Sir R. Finlay, K. C. and *G. R. Lowndes*, for the respondent, contended that the oral agreement pleaded and relied upon by the appellant was inconsistent with the terms of the promissory note sued upon, and did not constitute a legal defence to the suit. No evidence existed of the account given by the appellant as to the circumstances immediately prior to the execution of the promissory note. The Trial Judge for, it was submitted, very inadequate reasons, discredited the respondent's story, but was not justified in presuming that the appellant's account of the matter was thereby proved. There was nothing to show that the respondent ever consented to the alleged oral agreement that the liability of the appellant should unconditionally come to an end on 30th January 1908. The respondent's statement in his pleading was that the appellant's liability was to cease at that date only if he (the respondent) was before that time fully secured. That could not be taken as an admission that the liability in the note ceased if the condition remained unfulfilled. There was by section 92 of the Evidence Act no defence to the suit. [LORD DUNEDIN referred to, and read illustration (j) of section 92.] Reference was made to *Pym v. Campbell*⁽¹⁾; Taylor on evidence, 10th Ed., Vol. II, sections 1132, 1135; and *Wallis v. Littell*⁽²⁾. [LORD DUNEDIN referred to *Bholanath Khettri v. Kaliprasad Agurwalla*.⁽³⁾]

Upjohn, K. C. called upon to reply referred to *Holt v. Miers*⁽⁴⁾, and submitted that section 92 was not applicable, the evidence contended to be admissible not being evidence of any oral agreement between the parties which contradicted, varied, added to or subtracted from the terms of the promissory note. Re-

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(1) (1856) 6 El. & Bl. 370.

(3) (1871) 8 Ben. L. R. 89. at p. 92.

(2) (1861) 11 C. B. N. S. 369.

(4) (1839) 9 C. & P. 191.

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ference was made to *Bholanath Khettri v. Kaliprasad Agurwalla*⁽¹⁾; *Harris v. Rickett*⁽²⁾; and *Lindley v. Lacey*⁽³⁾. [*Lowndes* said those cases did not touch respondent's case at all.]

1915 February 25th:—The judgment of their Lordships was delivered by

LORD DUNEDIN:—The plaintiff-respondent, Mulji Haridas, sues the defendant-appellant, Motabhoy Mulla Essabhoy, upon a promissory note jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000, the consideration for making such advances being certain shares in an agency commission in a certain company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a further advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy, and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so on being given the joint promissory note in

(1) (1871) 8 Ben. L. R. 89 at p. 92. (2) (1859) 4 H. & N. 1 at p. 7.

(3) (1864) 34 L. J. C. P. 7.

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question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date, and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of first instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract, and would be inadmissible under section 92. But this bald averment does not

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represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus:—"It was agreed that on 30th January 1908 the advance then to become due by Mulji to Hyderally should be held as made by the monies paid on 23rd December 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of 30th January 1908." That would be an agreement in terms of proviso 2 to section 92, which allows to be proved "the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary *sequitur* that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordship's judgment, that the defendant fails.

The agreement must be an agreement to which the plaintiff Mulji is shown to have assented either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded, and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's Counsel sought to put his case thus: He said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of first instance disbelieved the story that any such condition was made the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. Therefore the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are therefore of opinion that the decree of the Court of Appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

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Solicitors for the appellant : Messrs. *Ranken, Ford, Ford and Chester.*

Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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January 18.

GAJANAN BALKRISHNA DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT, v. KASHINATH NARAYAN DESHPANDE (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Half-brother—Mitakshara.

The adoption of a half-brother is not invalid under Hindu Law.

SECOND appeal from the decision of J. D. Dikshit, District Judge of Thana, reversing the decree passed by R. B. Khangaonkar, Subordinate Judge at Mahad.

Suit to recover a share in certain cash allowance.

The cash allowance belonged originally to one Yeshvant. He had two wives. By one of them, he had a son Venkatesh ; and by the other, he had three more sons, Ganpat, Madhav and Narayan.

Venkatesh being childless adopted his half-brother Narayan. After the adoption, a son (Kashinath, defendant) was born to Narayan.

Madhav had a son Balkrishna, who had a son named Gajanan (plaintiff).

Ganpat died issueless. At his death, a dispute arose between Gajanan and Kashinath as to who was entitled to Ganpat's share in the cash allowance.

* Second appeal No. 652 of 1913.

Gajanan filed the present suit to recover his share in the cash allowance appertaining to Ganpat's share. He alleged that as Narayan was adopted by Venkatesh, both he (Gajanan) and Kashinath (defendant) were equally related to Ganpat and entitled to his share in equal moieties.

Kashinath contended in his written statement that Narayan's adoption by Venkatesh was invalid ; that he was consequently a near relation of Ganpat than Gajanan ; and that he was entitled as such to the whole of Ganpat's share.

The Subordinate Judge held that Narayan's adoption was valid ; and that plaintiff and defendant were entitled to Ganpat's share in equal moieties.

On appeal, the lower appellate Court held that the adoption was invalid. The decree was therefore reversed, and the suit remanded to the first Court for trial on the following issues :

1. Is defendant estopped from raising the plea about the invalidity of his father's adoption by Venkatesh ?
2. Is the defence barred by limitation ?

Against this order of remand, the plaintiff appealed to the High Court.

On the 30th January 1911, the High Court (Russell and Batchelor, JJ.) delivered the following judgment :

The Court thinks that the course adopted by the Judge in the lower appellate Court, so far as it goes, has been correct and that issues should be remanded to the first Court as stated by him in his judgment at p. 2 of the print ; but the Court thinks that these issues must be supplemented by another issue which will be numbered 1A to this effect :—

"If the defendant is not so estopped was Narayan's adoption valid in law ?"

Costs costs in the cause.

The Court adds that the opinion of Mr. Dikshit on the question of adoption is not to be taken as binding on the first Court which will find on the issues sent down as of first impression.

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The Subordinate Judge found the first issue in the affirmative; and the third in the negative. He held on the second issue, that the adoption was valid, for the following reasons:

As regards validity of adoption again, I find that the difficulties have arisen owing to the theory of *Niyoga* having no real basis in Sanskrit texts but having sprung from words like *putrachhyayavaham* or *virundhasambandh* in Shonnaka's text or Nand Pundit's gloss. From these words deductions came to be introduced that the natural mother in her maiden state must be such as could be married by the adoptive father or that the son to be adopted could be begotten on his natural mother by the adoptive father. I need not and dare not add to the learned judgment of Chaubal J., from pages 958 to 964 of 10 Bom. L. R. on this point, nor can I find anything that should enable any one to assail the broad proposition on this point by Ranade J. in 24 Bom. 473, at page 476. The Madras case (11 Mad. 49) relied on by defendant's pleader has been sufficiently discussed at page 963 of 10 Bom. L. R. and found to be not acceptable in its entirety as good law inasmuch as even in 20 Mad. 283 the Madras High Court had to give the principle on which 11 Mad. 49 was based a different direction. The Bombay authorities interpret the texts as directory only in respect of sons of daughter, sister and mother's sister and recommendatory as regards sons of other relatives and, therefore, the authority in 11 Mad. 49, not strictly followed even in 20 Mad. 283, cannot be followed by me.

I, therefore, proceed to see if it can be contended that a step-brother should not be adopted on the ground of absence of *putrachhyayavaham* or presence of *virudhasambandha* even though the text be recommendatory: At p. 474 (Mandlik on Vyavahara Mayukha) it has been set out that a younger brother is like a son *Jyeshtho bhrata pitus samah*, at page 495, he says that adoption by a younger brother of an elder brother is against law and usage but adoption by an elder brother of a younger brother is quite proper, and agreeable to law and usage of the country. Here, in this case, we have a step-brother *bhīmodara* and not a full brother *sahodara*; when maiden, Narayan's mother could have been married by Venkatesh. I do not think that Hindu notions disapprove of adoption of younger step-brothers. It is not disputed, nay, it has been admitted by defendant in his deposition that Venkatesh was the eldest of the brothers and the step-brother of Narayan the youngest. The perfect belief of all concerned, as stated above, for over sixty-five years in the validity of adoption, is itself the best indication of Hindu mind as to Narayan having been capable of being taken in adoption as being *putrachhyavaham* and not a son by *virudhasambandha*. The adoption is legal. Since the rulings in 24 Bcm. and 10 Bom. L. R. cited above the theories of *Niyoga* and marriage in maiden state have lost much of their force though I dare not

say they have been exploded inasmuch as the rulings allow and admit of exceptions in addition to the three specifically mentioned on the ground of absence of *putrachhayavaham* and presence of *virudhasambandha* such as adoption by a nephew of his uncle. No Hindu requires to be told how younger brothers are regarded as sons or elder sisters as mothers. I also add that if the gloss of Nand Pundit under the words *virudhasambandha* is to be interpreted as referring to marriage or *Niyoga* the step-mother could not have been married by Venkatesh and that, to this extent, this case differs from that in 10 Bom. L. R. before his Lordship Chaubal J., who, however, seems to treat the gloss as only recommendatory following the opinion of Ranade J., in 24 Bom. 24 Bom. 473 shows that the boy should only have "semblance" of a son from the standpoint of his age and circumstances and not from that of possibility of marriage of his mother with the person who adopts the boy or on the possibility of *Niyoga*.

On appeal, the District Judge found all the issues in the negative. He held that the adoption was invalid on the following grounds :—

"I adhere to my original view of law as regards the invalidity of the adoption. I do not think that the Subordinate Judge has properly applied the rulings in 10 Bom. L. R. 948 and 24 Bom. 473. At p. 957 of the report of the first cited case, Batchelor J., has observed : "By virtue of this deduction certain specified relatives are prohibited or excluded, that is, as being incapable of having sprung from the adopter himself through appointment to raise issue on another's wife." Then His Lordship proceeds and observes : "From the author's own explanation and from the words themselves, I am of opinion that 'prohibited connection' is confined to that particular illicit relation which, in English law, is known as incest. . . . Thus what we are asked to do is to extend certain peculiar and specific restrictions which, on their face, purport to be limited to cases of *Niyoga* and incest so that they shall embrace and include all complicated restrictions applicable to marriage." Chaubal J., at p. 961, exposes the mistaken translation of the text by English writer on Hindu Law and observes : "This alleged invalidity is based on the proposition which is roughly and broadly stated in English text books on Hindu Law, and in some decisions of our Courts, that a boy whose natural mother the adoptive father could not have legally married in her maiden state is ineligible for adoption. It will be presently shown that this broad statement rests purely on an inaccurate rendering by Mr. Sutherland of a passage in the Dattak Mimamasa of Nand Pandit." In my opinion, their Lordships have only set their faces against the extended application of the principle of restrictions to marriages to cases of adoption in the sense that the adoption can be valid only where the adoptive mother could have been legally married by the adoptive father in

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her maiden state. Their Lordships have affirmed the proposition that prohibition is restricted to cases where *Niyoga* is not possible. The principle quoted by me in my previous judgment from Bhattacharya's book is not touched by their Lordship's judgment. There cannot be any bar of limitation to raise the defence.

The plaintiff appealed to the High Court.

Setlur, with *S. S. Patkar*, for the appellant.—The adoption of a step-brother can be lawfully made. The principle of 'inconsistent relationship' (*viruddha-sambandha*) does not come in its way. For the purposes of the principle the eligibility of the woman for marriage should be considered with reference to her maiden state. So regarded, there is no prohibition to a step-son marrying the step-mother when in her maiden state. But even that principle is held applicable only to the three specified cases of (1) the daughter's son; (2) the sister's son, and (3) the mother's sister's son. See *Ramchandra v. Gopal*⁽¹⁾; *Walbai v. Heerbai*⁽²⁾; *Yamnava v. Laxman Bhimrao*⁽³⁾; *Ramkrishna v. Chimnaji*⁽⁴⁾; *Bhagwan Singh v. Bhagwan Singh*⁽⁵⁾; *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamamma*⁽⁶⁾.

The lower Court has further resorted to the doctrine of *Niyoga* in pronouncing against the validity of the adoption. But the doctrine does not carry us further than the principle last mentioned. The persons who are mentioned in I Yajnavalkya 68, Mitakshara, Book 1, Chapter IV, are all persons who could have married the widow in her maiden state.

Jayakar, with *W. B. Pradhan*, for the respondent.—It is expressly laid down in the Dattaka Mimansa, s. 5, pl. 16—20, that the brother cannot be adopted. The term 'brother' would include a 'step-brother' as well.

(1) (1908) 32 Bom. 619.

(4) (1913) 15 Bom. L. R. 824.

(2) (1909) 34 Bom. 491.

(5) (1899) L. R. 26 I. A. 153 at pp. 159, 161.

(3) (1912) 36 Bom. 533.

(6) (1899) L. R. 26 I. A. 113.

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The rule of *viruddhasambandha* has no reference to the unmarried state of the natural mother but to her married state. The principle has been approved of in *Minakshi v. Ramanada*⁽¹⁾; *Ramkrishna v. Chinnaji*⁽²⁾. It was followed in *Sriramulu v. Ramayya*⁽³⁾; and *Haran Chunder Banerji v. Hurro Mohun Chuckerbutty*⁽⁴⁾. See also Mayne's Hindu Law (7th edn.), paragraph 135, page 174; Trevelyan's Hindu Law, page 137.

The doctrine of *Niyoga* may be obsolete, but the cases excepted even in times when *Niyoga* was practised, as being too sacred to be submitted to its operation, *i.e.*, cases where sexual intercourse, by whatever name it was dignified, would be with a person who was either the mother or one equal to her in the domestic circle, were based on the common sentiment of morality. That sentiment is crystallized into the form of a rule in the Dattaka Mimansa. The authority of the Dattaka Mimansa is recognised in *Bhagwan Singh v. Bhagwan Singh*⁽⁵⁾; *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*⁽⁶⁾; and *Ramchandra v. Gopal*⁽⁷⁾. See Sarkar's Law of Adoption, pages 321, 324 and 330.

Sethur, in reply.—The term 'brother' in paragraph 17, section 5 of the Dattaka Mimansa does not include 'step-brother,' because the author in an early part of the treatise has expressly said so: see section II, paragraph 31, read with paragraph 30.

C. A. V.

SHAH, J.—Two questions of law have been argued in this appeal—one relating to the validity of an adoption, the other relating to estoppel. The facts which

(1) (1886) 11 Mad. 49 at p. 53.

(2) (1913) 15 Bom. L. R. 824.

(3) (1881) 3 Mad. 15.

(4) (1880) 6 Cal. 41 at p. 47.

(5) (1899) L. R. 26 I. A. 153 at p. 166.

(6) (1899) L. R. 26 I. A. 113 at p. 132.

(7) (1908) 32 Bom. 619.

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give rise to the question of adoption are not in dispute now and may be briefly stated. One Yeshwant died leaving four sons—Venkatesh by one wife, and Ganpat, Madhav, and Narayan by another wife. Venkatesh died many years ago after adopting his step-brother, Narayan. Narayan died leaving a son—Kashinath, who was the defendant in the trial Court and is the respondent here. There was a division among the brothers, whether during or after the life-time of Venkatesh does not appear to be clear and is not material. Ganpat died sonless, leaving a widow who died in 1903. Madhav had a son Balkrishna, who died leaving a son Gajanan, who was the plaintiff in the Court below and is the appellant here. The dispute relates to Ganpat's share in a certain allowance, which, the plaintiff says, he is entitled to share equally with the defendant, the latter contending that he is the exclusive owner of Ganpat's interest in the allowance. The parties are Prabhus by caste. It is common ground now that if the adoption of Narayan by Venkatesh be valid, the plaintiff must succeed.

In the lower Courts the defendant urged that the adoption by Venkatesh of his younger half-brother Narayan was invalid. The lower Courts have differed as to the validity of the adoption, the trial Court holding it to be valid, the appellate Court holding it to be invalid.

In the Second Appeal before us the same question has been raised. Mr. Setlur, for the appellant, contends that the adoption of a half-brother is not invalid according to Hindu Law, that the long course of decisions of this Court is in favour of the view that the restrictions recommended by Nanda Pandita are not really binding, and that the doctrine of *Niyoga*, upon which the lower appellate Court has relied in deference to the opinion expressed by Dr. Bhattacharya in his treatise on Hindu Law, affords no basis for invalidating an adoption,

which is otherwise valid—at least so far as this Presidency is concerned. Mr. Jayakar, for the respondent, strongly relies upon the opinions of Nanda Pandita expressed in the Dattaka Mimansa in his commentary on the expression ‘bearing the reflection of a son’ (*putrachhayavaham*) in Caunaka’s text in paragraphs 16 to 20, particularly paragraphs 17 and 19 in Chapter V. It is argued that the Mitakshara and the Vyavahara Mayukha do not afford any assistance on this point, and that in matters of adoption the opinions of Nanda Pandita are entitled to great weight and ought to be given effect to. Mr. Jayakar concedes that the restrictions arising out of the necessity of a valid marriage between the natural mother and the adoptive father being possible are merely recommendatory except as to the three specified cases of a daughter’s son, sister’s son and mother’s sister’s son mentioned in Cakala’s text. But his argument is that the test of a valid marriage being possible between the natural mother and the adoptive father is quite distinct from that based on the doctrine of *Niyoga* or of incestuous connection (*viruddhasambandha*) and that though the restrictions arising from one are held to be recommendatory, the restrictions arising from the other two tests are not so held. He does not lay any stress on the restrictions based upon the rules connected with the practice of *Niyoga*. But he maintains that the restrictions based upon the prohibition of incestuous connection (*viruddhasambandha*) have nowhere been held to be merely recommendatory, and ought to be held mandatory. The adoption in question is vitiated, it is argued, as any connection between the step-mother and the step-son would be incestuous. It is also argued that the sentiment of the community favours such restrictions and that the sentiment is clearly expressed by Nanda Pandita.

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We have given our best consideration to these arguments, particularly as Mr. Jayakar has insisted that in none of the decided cases has this point been considered and decided, and that in none of the cases except one it was necessary to consider it. We are, however, unable to accept the suggestion that the argument is new or that it has not been considered, or that it was not necessary to consider it, on previous occasions; and quite apart from the previous decisions we are unable to think that the argument is sound.

It has been held by this Court in a number of cases that the opinions of Nanda Pandita, when they are not supported by any text of the Smriti writers are, generally speaking, recommendatory and not mandatory : see *Bai Nani v. Chunilal*⁽¹⁾; *Vyas Chimanal v. Vyas Ramchandra*⁽²⁾; *Ramchandra v. Gopal*⁽³⁾; *Yamnav v. Laxman Bhimrao*⁽⁴⁾; and *Ramkrishna v. Chimnaji*⁽⁵⁾. Their Lordships of the Privy Council have indicated substantially the same view as to certain opinions of Nanda Pandita in *Srimati Uma Deyi v. Gokoolanund Das Mahapatra*⁽⁶⁾; and *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*⁽⁷⁾. It is quite true that in some of these cases the opinions of Nanda Pandita that were under consideration were not the same as those with which we are concerned now. But it is difficult to say that of the last three cases of this Court above referred to. In the case of *Yamnav v. Laxman Bhimrao*⁽⁴⁾ Sir N. Chandavarkar J., after considering these very opinions of Nanda Pandita (in paragraphs 16 to 19 of section V of the Dattaka Mimamsa), expressed his conclusion in the following clear and definite

(1) (1897) 22 Bom. 973 at pp. 978, 979. (4) (1912) 36 Bom. 533.

(2) (1899) 24 Bom. 473 at p. 481. (5) (1913) 15 Bom. L. R. 824.

(3) (1908) 32 Bom. 619 at p. 633. (6) (1878) L. R. 5 I. A. 40.

(7) (1898) L. R. 26 I. A. 113.

terms :—"It is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son." This decision was followed in the case of *Ramkrishna v. Chinnaji*⁽¹⁾. It is difficult to see how the argument based on the test of *virudhhasambandha* could have been passed over in *Ramkrishna's case*⁽¹⁾ without consideration when the decision of the District Judge in that case which was reversed by the High Court, was based substantially on that ground. We have heard nothing in the course of an interesting argument from Mr. Jayakar, which can induce us to think that there is anything in the decisions of this Court bearing on this point, which requires to be re-considered.

Apart from the decisions, we would find no serious difficulty in arriving at the same conclusion and in holding that the opinions expressed by Nanda Pandita in his commentary on the expression *putrachhayavaham* are merely recommendatory and not mandatory in the absence of any support from any Smriti writer. It is not suggested that the particular opinions expressed in paragraphs 17 and 19 of section V are supported by any such authority.

We have considered the dictum of Muttusami Ayyar J. in *Sriramulu v. Ramayya*⁽²⁾ that the adoption of a half-brother is invalid and the decision of the Sadar Divani Adalat of Bengal in *Baboo Runjeet Sing v. Baboo Obhaye Narain Sing*⁽³⁾ that the adoption of an elder brother by a younger brother is invalid. We are not sure that the Madras High Court would now accept the dictum of

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⁽¹⁾ (1913) 15. Bom. L. R. 824.⁽²⁾ (1881) 3 Mad. 15.⁽³⁾ (1817) 2 S. D. 245.

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the learned Judge as finally decisive of the point. But apart from that, in determining the weight to be attached to the opinions of Nanda Pandita on this point in Western India, we must prefer to be guided by the decisions of our Court.

The learned District Judge might well have paused before setting aside an adoption made more than fifty years ago, acquiesced in by all the parties concerned during this long period and questioned for the first time by the present defendant apparently under the inducement of resisting the plaintiff's claim, and might have scrutinized the opinion of Dr. Bhattacharya more closely, particularly when the learned author himself expresses a doubt as to the applicability of the restrictions based on the rules of *Niyoga* to this Presidency : see Bhattacharya's Hindu Law, 3rd Edition, pages 169-170.

We, therefore, hold that the adoption of Narayan by Venkatesh is valid. Having regard to the view we take of the adoption, it is not necessary to decide the question of estoppel which has been argued in this appeal.

The result is that the decree of the lower appellate Court is reversed and that of the trial Court restored with costs of this and the lower appellate Court on the defendant.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

BHARMA BIN SHIDAPPA PUJARI (ORIGINAL DEFENDANT 1), 1915.
 APPELLANT, v. BHAMAGAVDA SHIVAGAVDA DHAMANAVAR AND January 28.
 OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS, AND
 BHARMA BIN SHIDAPPA PUJARI AND ANOTHER (ORIGINAL DEFENDANTS
 1 AND 2), APPELLANTS, v. BHAMAGAVDA SHIVAGAVDA DHAMA-
 NAVAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 3),
 RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—
 Appeal—Decision as to res judicata.*

A decision that a matter is not *res judicata* is not a preliminary decree.

Chanmalswami v. Gangadharappa⁽¹⁾, followed.

FIRST appeals against the decision of S. R. Koppikar,
 First Class Subordinate Judge of Belgaum.

The plaintiff claiming to be the owner under the will of his maternal uncle Ramgavada Marigavada sued for a declaration that defendant 1 was not duly adopted by Bayaka, widow of Ramgavda, and for possession of lands in suit; or in the alternative of the will being held not proved, for possession of the said property jointly with defendant 3 as the sons of the sister of the original owner.

The defendant 1 contended that he was the legally adopted son of Ramgavda; that Bayaka passed a registered deed of adoption to that effect on 14th December 1911; that the will alleged was false; that the value of the property was overstated; that the claim was barred as *res judicata* in virtue of previous litigation between the parties.

The Subordinate Judge found in favour of the plaintiff on a preliminary issue and held that the suit was not barred as *res judicata*.

* First Appeals Nos. 48 and 110 of 1914.

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The defendants preferred these appeals.

S. R. Bakhale for the appellants.

S. M. Kaikini for the respondents.

SCOTT, C. J.:—Applying the Full Bench ruling in *Chanmalswami v. Gangadharappa*⁽¹⁾, we hold that, a decision that a matter is not *res judicata*, and that, therefore, the trial can proceed is not a preliminary decree from which an appeal will lie at this stage. We dismiss both the appeals. Costs, costs in the cause.

Appeals dismissed.

J. G. R.

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Before Mr. Justice Heaton and Mr. Justice Shah.

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THE MUNICIPAL COMMITTEE OF NASIK CITY (ORIGINAL DEFENDANT), APPELLANT, *v.* THE COLLECTOR OF NASIK ON BEHALF OF THE COURT OF WARDS, THE ADMINISTRATOR OF THE ESTATE OF SARDAR GOPALRAO SHIVADEV-RAO RAJE BHADUR (ORIGINAL PLAINTIFF), RESPONDENT⁽¹⁾.

AMIRUDDIN VALAD MAHOMED HUSSEIN AND OTHERS (ORIGINAL DEFENDANTS Nos. 2, 3 AND 4), APPELLANTS, *v.* MAHOMED SAYAD VALAD MAHOMED ALI ISANE (ORIGINAL PLAINTIFF No. 10), RESPONDENT⁽²⁾.

EKOBA GUNASHET VANI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SARAF ALLI MAHMAD ALLI BOHARI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS⁽³⁾.

MAHAMAD HUSSEIN VALAD MAHAMAD ALLI ISANE (ORIGINAL PLAINTIFF No. 2), APPELLANT, *v.* MARYAMBIBI AYAL SAMSUDDIN VALAD BHAUDIN ZATAM (ORIGINAL DEFENDANTS Nos. 1, 2, 3 AND 4), RESPONDENTS⁽⁴⁾.

(1) First appeal No. 293 of 1912.

(3) First appeal No. 26 of 1914.

(2) First appeal No. 271 of 1913.

(4) First appeal No. 50 of 1914.

GULABCHAND RAUTMAL AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. BALIRAM NARAYAN AND OTHERS (ORIGINAL PLAINTIFFS),
RESPONDENTS⁽¹⁾.

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Civil Procedure Code (Act V of 1903), sections 2 and 97—Preliminary decree—Finding on a preliminary issue whether a party is an agriculturist—In what cases is the finding a preliminary decree—Dekkhān Agriculturists' Relief Act (XVII of 1879), section 13.

The finding on a preliminary issue, whether a party is or is not an agriculturist, can be the basis of a preliminary decree, only when it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. That is to say, it is a preliminary decree in those cases where it necessarily involves the result that the accounts should be taken under section 13 of the Dekkhān Agriculturists' Relief Act, 1879, despite the terms of the contract to the contrary. It is not a preliminary decree, when there are other questions yet to be determined before the parties could be held entitled to have accounts taken under section 13 of the Act.

(1) APPEAL from the decision of F. W. Allison, Assistant Judge at Nasik.

(2) Appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge at Thana.

(3) Appeal from the decision of M. N. Choksi, Additional First Class Subordinate Judge at Dhulia.

(4) Appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge at Thana.

(5) Appeal from the decision of M. N. Choksi, Additional First Class Subordinate Judge at Dhulia.

The facts in these appeals were as follows :—

In appeal No. 293 of 1912, the plaintiff sued to recover possession of a house which was mortgaged with possession to the defendants, on condition that the defendants were to enjoy the house in lieu of interest. The plaintiff asked that this latter condition in the mortgage-deed should be cancelled and accounts taken in the manner provided for in the Dekkhān Agriculturists' Relief Act, 1879.

⁽¹⁾ First appeal No. 67 of 1914.

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The defendants contended *inter alia* that the plaintiff was not an agriculturist.

A preliminary issue was raised on the contention. The Court found that the plaintiff was an agriculturist and was entitled to the benefits conferred by the Dekkhan Agriculturists' Relief Act. The finding was embodied in a preliminary decree.

The defendants appealed from the preliminary decree.

Appeals Nos. 271 of 1913 and 50 of 1914 arose out of one suit. The suit was instituted to redeem and recover possession of mortgaged property after taking an account under the Dekkhan Agriculturists' Relief Act. On defendants' contention, the Court raised a preliminary issue: "Are plaintiffs or any of them agriculturists?" The finding recorded was that plaintiff No. 10 was but that plaintiff No. 2 was not an agriculturist. From the decree framed in terms of the finding, the two appeals were preferred.

In appeal No. 26 of 1914, the suit was brought to redeem and recover possession of the mortgaged property on payment of instalments of the balance found due on taking accounts under the Dekkhan Agriculturists' Relief Act. The defendants having disputed plaintiff's status, a preliminary issue was raised: "Whether the plaintiff was proved to be an agriculturist?" The issue was found in the negative. The finding was embodied in a preliminary decree. The plaintiff appealed from the decree.

In appeal No. 67 of 1913, the suit was brought on a promissory note to recover its amount with interest from the defendants. The defendants contended that they were agriculturists, that accounts between the parties should be taken in the manner provided for by the Dekkhan Agriculturists' Relief Act, and that the

sum found due should be made payable in annual instalments of Rs. 1,000 each.

The Court raised a preliminary issue: "Are the defendants or any of them proved to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act?" This issue was found in the negative and a decree was framed accordingly.

The defendants appealed from the decree.

Appeal No. 293 of 1912.

D. R. Patvardhan, for the appellant.

S. S. Patkar, Government Pleader, for the respondent.

Appeal No. 271 of 1913.

S. S. Patkar, for the appellants.

V. B. Virkar, for the respondent.

Appeal No. 26 of 1914.

M. V. Bhat, for the appellant.

D. G. Dalvi, for respondent No. 1.

Appeal No. 50 of 1914.

V. B. Virkar, for the appellant.

S. S. Patkar, for the respondents Nos. 2 to 6.

Appeal No. 67 of 1914.

G. S. Rao, for the appellants.

P. B. Shingne, for the respondents.

HEATON, J.—We are dealing with five appeals.—F. A. 50 of 1914, F. A. 271 of 1913, F. A. 67 of 1914, F. A. 26 of 1914 and F. A. 293 of 1912. They all raise the same point and we have now to decide whether a finding on the issue "Is the plaintiff an agriculturist" can legally form the basis of a preliminary decree and, therefore, be the subject of an appeal. The subject of preliminary decrees in general is discussed in the referring judg-

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ments in the case of *Chanmalswami v. Gangadharappa*⁽¹⁾ and we have the decision of the Full Bench in that case.

There is no doubt now that the words "the rights of the parties with regard to all or any of the matters in controversy in the suit" which occur in the definition of "decree" have not their widest possible meaning: they have a meaning restricted in some way or another. No one for example asserts that they include the right to ask a particular witness a particular question; or the right to put in evidence a particular document; and it is now decided by a Full Bench of this Court that they do not include the right to proceed with a suit in a particular Court or after a particular time.

How then are we to find out how the meaning of the words is restricted? To me it seems that the correct course is to ascertain their meaning from the provisions of the Code in which they occur. The words "decree" and "order" are so defined as to include all the orders a Court makes. We have some clue to what an order is in the enumeration of appealable orders given in Order XLIII of the Code. They certainly seem to include generally an order by the Court that it will or will not hear a suit on the merits and this general intention is not seriously disturbed by the provision that an order rejecting a plaint is a decree or by the fact that the dismissal of a suit on a preliminary point is a decree. Generally speaking, therefore, I infer that an order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. And the decision of the Full Bench, so far as it goes, supports this conclusion.

A decision that a party is or is not an agriculturist is something more than a decision to go on with a suit.

⁽¹⁾ (1914) 39 Bom. 339.

for it determines also the law that the Court will apply ; whether the Dekkhan Agriculturists' Relief Act or the ordinary law. That does not seem to make any difference in principle, for the principle, so far as I can understand it, is that the progress of a suit is not to be interrupted by an appeal until there has been a decision either partial or entire, on the merits.

This is, I think, plainly to be inferred from the provisions of the Code relating to the trial of suits. These provisions are discussed by Hayward J. in his referring judgment in the Full Bench case. It is unnecessary here to repeat the discussion. I will only summarise it by saying that the Code intends the Court to hear and decide that which the parties come to Court to have decided, then to pronounce judgment and then to make a decree. As is pointed out by Beaman J. in his referring judgment, the parties come to Court to get decided some claim to property or to money or to an easement or the like. They do not come to Court for the purpose of having it decided whether one or another of them is an agriculturist. That is an incidental or accidental matter not intimately related to the claim itself, but related to the procedure the Court must follow and the law it must apply.

This conclusion that the Court before pronouncing judgment and making a decree must determine the real claim in whole or part is very strongly supported by the provisions of Rule 3 of Order XV of the Code. This rule covers the case of preliminary issues and provides that the findings on some only of the issues conclude the suit if those findings are enough for the decision of the suit : if not the suit must proceed. To my mind, having regard to the provisions of Order XX relating to judgment and decree, this means that if the suit is to proceed there shall not be a true judgment and consequently not a decree at that stage. There may be a

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pronouncement of the Court's finding so far as it goes, but this is not a judgment of the kind which must be followed by a decree.

On purely general grounds I arrive at the same conclusion. If a finding on a preliminary issue can properly be the basis of a decree, then each preliminary issue could lawfully be tried separately and each such trial could be followed by an appeal. There might thus be two or three or more preliminary trials and appeals before the trial of the real claim was reached. I do not believe the legislature intended to enact so vicious a law. How vicious, is plainly indicated by the observations of the Privy Council quoted in the referring judgment of Hayward J.

Again we have the assistance of the Code in discovering what, within its intention, are preliminary decrees. There is an enumeration of such decrees in Orders XX and XXXIV. Not necessarily a complete, but a very suggestive enumeration; suggestive as showing that a preliminary decree is not to be drawn up until the real claim has been investigated and in part decided.

My conclusion, therefore, is that in the cases before us except First Appeal No. 293 of 1912 the finding that a party is or is not an agriculturist is not a judgment such as is intended by Order XX of the Code and is not a proper basis for a decree: and that a decree drawn up on the basis of such a finding alone and specifying such a conclusion alone, is not a legal decree at all and cannot be the subject of an appeal.

It follows from this that in First Appeals Nos. 26 of 1914, 50 of 1914, 67 of 1914 and 271 of 1913 we find that no appeal lies and the order of the Court will be that these cases be remanded to be tried according to law; costs to be costs in the suit.

In Appeal No. 271, as no appeal lies, there cannot be any hearing of the cross-objections. The costs of these like the costs in the appeal will be costs in the suit.

The question which arises in Appeal No. 293 of 1912 is different. It has been determined in that suit that the plaintiff is an agriculturist. Though it seems to me that the decree which has been drawn up is not in proper form a preliminary decree, yet in substance it may be taken to be a preliminary decree directing that an account be taken between the parties in the manner provided by section 13 of the Dekkhan Agriculturists' Relief Act. If that were in fact the form of the decree there could not, I think, be any real doubt that it was a true preliminary decree and that an appeal would lie. The only doubt that occurred to my mind is this, that, owing to the understanding of the Judge of the law as it then stood, he never applied his mind (of course this was no fault of his) to the question whether he should or should not at that stage draw up a preliminary decree. But seeing that this appeal is now before us, and that a true preliminary decree could have been drawn up, it seems to me far better in the interests of justice to assume that the decree is defective only in form and not in substance, to hold that an appeal does lie, and to determine the appeal on the merits. To do otherwise would lead to a remand and this matter which is before us and which the parties are ready to argue would be delayed for an indefinite time. I wish particularly however to add this: Judges will now come to understand the view of the law which we have here set out, which is that in order that the preliminary decrees in these cases may be in proper form they must be in the form of decree, for taking an account as provided by Rule 16 of Order XX of the Code of Civil Procedure. But whether the Judge will make such a preliminary decree immediately on finding that a party is an agriculturist

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is a matter which lies within the Judge's discretion. Rule 16 no doubt requires that a preliminary decree is to be made where an account has to be taken; but as will appear from Rule 17 the Court may, if it is so minded, determine various matters which go to help the taking of the account before it makes this preliminary decree. The Court may, for example, (taking the case before us) determine the amount of the principal; the amount that is to be taken as the annual profits or rent of the house; and the rate of interest that it will allow as provided by section 71 (a) of the Dekkhan Agriculturists' Relief Act. It is open to the Court, if it is so minded, to determine such matters before making a preliminary decree under Rule 16 of Order XX. That is all that I wish to say in this matter. Appeal No. 293 of 1912 will be set down for hearing on its merits.

SHAH, J. :—The question that arises in these appeals is whether the decision that a party is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, when formally expressed, is a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. Apparently prior to the decision of the Full Bench in *Chanmalswami v. Gangadharappa*⁽¹⁾, it was accepted that such a finding, when formally expressed, would be a preliminary decree; it seems to me that after the Full Bench ruling, the view requires to be reconsidered.

According to the definition a formal expression of an adjudication, which conclusively determines the rights of the parties with regard to all or any of the matters in controversy, is a decree, which may be preliminary or final. Reading the definition in the light of the other provisions of the Code as to preliminary decrees, and taking the scheme of the Code with regard to the-

⁽¹⁾ (1914) 39 Bom. 339.

disposal of the suits, it seems to me that the word "matter" in the definition means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties, which directly affect the relief to be granted or which, in the words of the definition, relate to all or any of the matters in controversy. The explanation to the definition shows that a partial or complete disposal of the suit is involved in a decree. This interpretation of the definition derives support from the ruling in *Chanmalswami's case*⁽¹⁾.

An adjudication which satisfies these conditions would form the basis of a decree, and may be preliminary or final according as it partially or completely disposes of the suit. It is not essential that an adjudication should be covered by any one of the specific cases of preliminary decrees mentioned in Order XX of the Code, in order that it may form the basis of a preliminary decree. Those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree".

Having regard to the view I take of the definition, it seems to me that in all these cases it must be determined with reference to the pleadings whether the finding that a person is or is not an agriculturist can form the basis of a preliminary decree. No such finding by itself, in my opinion, can be the basis of a preliminary decree, unless it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. To illustrate my meaning, I would take two cases, one in which the plaintiff sues for redemption of a mortgage contrary to the terms of the mortgage alleging that he is an agriculturist, and claims the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, and the other in which the plaintiff sues for

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the redemption of a mortgage, which is in form a sale, and which he seeks to prove to be a mortgage in virtue of the provisions of section 10A of the Dekkhan Agriculturists' Relief Act. If it be found that he is an agriculturist, in the former case he will be entitled to have the accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act in supersession of the original contract between the parties: in the other case the finding by itself will not entitle him to such accounts, as he will have further to establish that the transaction is a mortgage and not a sale. According to my view, the finding in the former case may form substantially the basis of a preliminary decree while in the latter it cannot. The ruling in *Krishnaji v. Maruti*⁽¹⁾, as I read it, seems to be quite consistent with this view.

It is common ground in F. A. 271 of 1913 and 50 of 1914 that before the plaintiffs could be held entitled to have accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act there are other questions to be determined. It is clear, therefore, that there is no proper preliminary decree to appeal from. In Appeal No. 26 the finding that the plaintiff is not an agriculturist is either sufficient to dispose of the suit completely or insufficient to dispose of anything. The pleadings are not fully stated to us. But it is clear that in any case there is no proper *preliminary* decree to appeal from. In Appeal No. 67 of 1914 the finding that the defendants are not agriculturists does not dispose of any matter in suit, and affords no basis for a proper preliminary decree.

In Appeal No. 293 of 1914, it seems to me that there is a preliminary decree, which could be appealed from. Having regard to the pleadings it is clear that the finding necessarily involves the result that the accounts should be taken under section 13 of the Dekkhan Agri-

⁽¹⁾ (1910) 12 Bom. L. R. 762.

culturists' Relief Act, despite the terms of the contract to the contrary, and that the original contract to that extent is superseded. It may be that in order to take the accounts the rate of interest and the amount of the principal will have to be determined hereafter. But that would not, in my opinion, affect the question whether the adjudication, when it is formally expressed, is a preliminary decree. In this case I hold that substantially there is a preliminary decree, from which an appeal would lie. It is, however, necessary to point out that in such a case the decree should be in form a proper preliminary decree. As I have already stated, it is not the formal expression of a finding that a person is an agriculturist but of its necessary consequence that accounts should be taken under the Dekkhan Agriculturists' Relief Act in supersession of the contract between the parties that forms a preliminary decree. In a properly framed decree this result should appear clearly on the face of it, and should not be left to be inferred by the appellate Court as in this case. It is, I think, open to the Court to draw up a proper decree directing accounts to be taken under the Dekkhan Agriculturists' Relief Act either before or after deciding all matters which are necessary for the actual taking of the accounts.

I concur, therefore, in the orders proposed by my learned brother in all the appeals.

Orders accordingly.

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APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor and
Mr. Justice Beaman.*

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IN RE GANGARAM NARAYANDAS TELI.*

February 26.

Indian Stamp Act (II of 1899), section 59, schedule I, article 35, clause (a), sub-clause (iii)—Lease—Lessee agreeing to pay annual rent plus Government assessment—Whether rent includes assessment for purposes of stamp duty.

A piece of land was leased for five years whereby the lessee agreed to pay to the lessor Rs. 100 as rent plus Rs. 16-8-0 on account of Government assessment. The question being referred whether the stamp duty should be levied on Rs. 100 or Rs. 116-8-0 the total amount of rent and Government assessment.

Held, that the Government assessment did not form part of the profit and therefore the stamp duty was leviable only on Rs. 100 the annual rent, under schedule I, article 35, clause (a), sub-clause (iii), of Stamp Act.

REFERENCE by Mr. McNeill, Acting Commissioner, Central Division, under section 59 of the Indian Stamp Act (II of 1899).

A piece of land was leased at Sholapur for five years at an annual rent of Rs. 100 plus Rs. 16-8-0 on account of Government assessment, the terms of the lease being as follows :—

“Lease of a piece of land for 5 years reserving annual rent of Rs. 116-8-0 executed in favour of Gangaram Narayandas Teli, agriculturist, inhabitant of Sholapur, by Vithoba valad Onkari Patel, Vani, agriculturist, inhabitant of Hodgi, taluka Sholapur.

I have taken from you on lease for cultivation your ancestral land which is in your possession and enjoyment. The land in question is situated at Mouje Hodgi in the taluka and sub-district of Sholapur, district Sholapur.

(Here follows the description of the land given on lease.)

* * * * *

The above described land has been taken from you on lease from Chaitra Shudha 1st Shake 1835 to the end of Shake 1839 for five years and has been given into my possession from the same date. I will take great pains for cultivating the land and one-half portion of every kind of produce that may be raised will be given to you every year and the remainder will be appropriated

* Reference No. 25 of 1914.

by me. I will pay you every year Rs. 16-8-0 on account of Government assessment which you may pay. I will repair and keep in order the earthen *bandhas* round the fields. I shall protect the trees and manage to pay other dues (balutas). If in any one year, I make default in giving you moiety of the produce I shall pay you Rs. 100 as damages in addition to the assessment of Rs. 16-8-0. In case I fail to give either the produce or the damages I shall hand over the possession of the land to you without questioning the period of the lease and I will pay you the unpaid amount of the rent from my personal property. If I continue to pay the rent together with the assessment as agreed I will cultivate the land till the determination of the lease and will transfer its possession to you when the period of the lease is over without any objection. This lease has been executed by me on 10th April 1913."

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The deed was presented on a stamp of Rs. 2 and the question of proper stamp duty having arisen, the Inspector General of Registration decided that the stamp and registration fees were leviable on Rs. 116-8-0 that is on the amount directly paid to the lessor plus Government assessment paid directly by the lessee on behalf of lessor to Government.

The matter went up to the Commissioner, Central Division, who in making the reference to the High Court, observed as follows :—

"As explained by the Inspector-General of Registration in paragraphs 6 and 7 of his letter No. 1656-Genl. of 13th August 1914 to Government the orders of Government of 1875 are old and conflicting with the decision of the Madras High Court (I. L. R. 7 Mad. 155) and require amendment.

In my opinion the words 'the rent reserved' in Article 35, Schedule I, should in their application to a lease in which a yearly rent is reserved be construed to mean the amount annually payable by the lessee to the lessor or to any other on behalf of the lessor. The direct payment of the Government assessment seems to be a 'service or other thing of value rendered to the transferee.' Rent as defined in the Transfer of Property Act is obviously not limited either to the amount of net profit accruing to the lessor or to the actual payment made to him direct."

The reference was heard.

S. S. Patkar, Government Pleader, in support of the reference :—The lease being for five years, Article 35, clause (a), sub-clause (iii), applies. The proper stamp is the "duty equal to the amount or value of the

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average annual rent recovered." Rent would include the amount of assessment agreed to be paid. I rely on *Reference under Stamp Act, section 46⁽¹⁾* and *In re A Reference by the Financial Commissioner of the Punjab⁽²⁾*. The stamp duty should, therefore, be levied on Rs. 116-8-0. This point is dealt with in the Punjab case, where Elsmie J. lays down "Had the lessee agreed to pay an uncertain amount and to be responsible for rise and fall of Government demand, it might have been difficult to regard the payment as of the nature of rent." Rent is defined by Transfer of Property Act, section 105, as "money, share of crops, service or any other thing of value to be rendered periodically or on specified occasion to the transferor by the transferee." The landlord is primarily liable to pay land revenue under the Land Revenue Code and when the tenant agrees to pay Government assessment it is service or other thing of value to be rendered periodically by the transferee to the transferor. Supposing the land is let in consideration of payment of assessment only can it be said that there is no rent? The proper stamp duty therefore should be levied on Rs. 116-8-0.

SCOTT, C. J. :—This is a reference to the Court under section 59 of the Indian Stamp Act in the matter of a lease executed in favour of Gangaram Narayandas Teli by Vithoba valad Onkari Patel Vani, and the question, as stated in the reference, is, whether in the case of a lease containing a stipulation regarding the payment by the lessee to the lessor of Government assessment, etc., for its eventual payment by the lessor to the Government, stamp duty should be calculated on the total amount of rent and Government assessment, etc. The stipulations in the lease are as follows :—

"The above described land has been taken from you...for five years and has been given into my possession from the same date. I will take great pains for

⁽¹⁾ (1883) 7 Mad. 155.

⁽²⁾ (1882) P. R. No. 102 of 1882.

cultivating the land and one-half portion of every kind of produce that may be raised will be given to you every year, and the remainder will be appropriated by me. I will pay you every year Rs. 16-8-0 on account of Government assessment which you may pay. I will repair and keep in order the earthen *bandhas* round the fields. I shall protect the trees and manage to pay other dues. If, in any one year, I make default in giving you moiety of the produce, I shall pay you Rs. 100 as damages in addition to the assessment of Rs. 16-8-0."

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The Article of the Indian Stamp Act which applies to the case is Article 35. Assuming this to be a lease for a term in excess of five years, it would fall under clause (a), sub-clause (iii), and the duty prescribed would be "the same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent reserved," and the question is whether the rent is anything more than the moiety of the produce contracted to be given, or whether it includes Rs. 16-8-0 which is payable to Government as assessment by whoever may hold the land under the Government. The term "rent" is explained in Woodfall on Landlord and Tenant, as "a retribution or compensation for the lands demised." "Rent must always be a profit; . . . This profit must also be certain, or capable of being reduced to a certainty by either party, and must issue out of the thing granted, and not be part of the land or thing itself." Now applying that description to the present case, it appears to us that the only profit for the lands demised which the landlord would realize is the half of the produce, and that Rs. 16-8-0 is not part of the profit. It is a liability attaching to the thing itself in the hands of the lessor. The lessor under this covenant is really in no better position than if he had a covenant by a tenant to pay the assessment direct to Government, and if it were paid direct to Government, it could not be contended, as is admitted by the Government Pleader, that Rs. 16-8-0 should be deemed to be part of the rent. We answer the question referred in the negative. A question arising upon this lease appears not to have

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occurred to the referring authority, *viz.*, whether the lease does not fall under the exemption from Article 35 being a lease executed in the case of a cultivator for the purposes of cultivation, the average annual rent reserved not exceeding Rs. 100.

Answer accordingly.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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DAYABHAI RAGHUNATHDAS (ORIGINAL APPLICANT), APPELLANT, *v.*
BAI PARVATI AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

*Guardians and Wards Act (VIII of 1890), section 25—Custody of minor—
Application by guardian—Guardian need not be a certificated guardian.*

An application under section 25 of the Guardians and Wards Act (VIII of 1890) for the custody of a minor can be made by a guardian, who need not be a certificated guardian.

APPEAL from the decision of M. S. Advani, District Judge of Surat.

This was an application under the Guardians and Wards Act (VIII of 1890).

The applicant applied under section 25 of the Act to the District Judge at Surat to recover the custody of his minor daughter Bai Mani.

The District Judge was of opinion that the applicant, not being a certificated guardian of the minor, could not maintain application. The learned Judge dismissed it on the following grounds :—

It is contended by the learned Vakil that as the applicant is the natural guardian of the minor under the Hindu Law you could seek assistance of the Court under section 25 of the Act to have the custody of the minor. He has quoted no direct authority in support of his contention. He

* First Appeal No. 240 of 1914.

has drawn my attention to a case reported in I. L. R. 26 All. 594. There it was laid down that no suit would lie in a Court for recovery of the person of a minor but that a proper remedy would be an application under the Guardians and Wards Act, as that Act was intended to be a complete Code defining the rights and remedies of wards and guardians. If this ruling is carefully considered it will show that a person should, in the first instance, make an application under the Act to have himself appointed or declared guardian of the minor and then seek other reliefs.

The next case relied upon by the learned pleader is the one reported in I. L. R. 25 Bom. 574. There it was pointed out that there were three courses open to a person whose ward had been removed from his custody. Firstly, he could proceed in a criminal Court. This remedy has been taken advantage of by the applicant and his complaint has been rejected by the learned City Magistrate. Secondly, he can proceed under the Guardians and Wards Act. This remedy has been dropped after making an application to this Court. Thirdly, the guardian can file a suit.

Next case relied upon is the one reported in 16 Bom. L. R. 625. This case does not help the applicant. When looked through properly this authority is against the applicant, for it expressly lays down that "a District Court is not a Court exercising the jurisdiction of the Crown over infants and has no jurisdiction over infants except such jurisdiction as is conferred by the Guardians and Wards Act."

Chapter II of the Act deals with appointment and declaration of guardians. Then comes Chapter III which deals with duties, rights and liabilities of guardians.

It is in this chapter section 25 comes. Having regard to the position of section 25 in the Act it seems to me that the Legislature contemplated the appointment under the Act and it is only after the appointment had been made the guardian could seek the assistance of the Court to have the ward restored to him which had been removed from his custody. Here the applicant in paragraph 4 of the application definitely states that he does not want to be appointed or declared guardian of Bai Mani. Such being the case I am of opinion that I cannot grant his prayer. His proper course will be first to get himself appointed or declared guardian of Bai Mani under the Act and then move the Court for assistance under section 25 of the Act.

The applicant appealed to the High Court.

T. R. Desai, B. G. Rao and M. D. Daru, for the appellant.

G. N. Thakor, for the respondents.

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SHAH, J.:—This is an appeal under the Guardians and Wards Act. It arises out of an application made by the appellant to the District Court of Surat under section 25 of the Act for the custody of his minor daughter Bai Mani.

The lower Court has rejected this application on the ground that unless the appellant takes steps to be appointed a guardian of the minor, no application under section 25 could be entertained by that Court.

The correctness of this view has been questioned before us in this appeal. A 'guardian', as defined by the Act, means a person having the care of the person of a minor or of his property or of both his person and property. The appellant is the father of the minor and claims to be her natural guardian. Section 25 refers to the custody of a guardian and not of a guardian appointed under the Act. This distinction between a guardian and a guardian appointed under the Act is to be noticed throughout the Act. As an illustration we may refer to section 26 of the Act where provision is made with reference to a guardian of the person appointed or declared by the Court.

It seems that it is open to an aggrieved party to make an application to the Court under section 25 where the ward leaves or is removed from the custody of a guardian of his person. It is not essential that there should be a certificated guardian before an application under section 25 could be entertained by the Court. We do not see anything either in the scheme of the Act or in the position of section 25 in Chapter III which relates to duties, rights and liabilities of a guardian, which can be said to be in conflict with this view; on the contrary it appears that the scheme of the Act supports it.

We say nothing as to the merits of the application. It was suggested on behalf of the respondents that

the application may be disposed of on the merits here. But the lower Court has decided the application on a preliminary ground and it would not be right to say anything as to the merits at this stage. This appeal is decided only on the allegations made in the petition, which contains an averment that the applicant is a guardian of the minor as defined by the Act and that the ward is removed from his custody.

It follows, therefore, that the order of the lower Court must be set aside and the application sent back to that Court for disposal according to law.

Costs to be costs in the application.

Order set aside.

R. R.

PRIVY COUNCIL.*

BAL GANGADHAR TILAK AND OTHERS, PLAINTIFFS, *v.* SHRINIVAS
PANDIT AND OTHERS, DEFENDANTS.

[On appeal from the High Court of Judicature at Bombay.]

Hindu law—Adoption—Validity of adoption—Non-performance of ceremony of datta homam—Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of section 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses—General allegations of undue influence and fraud without specific issues or pleas.

On this appeal, their Lordships of the Judicial Committee, in a suit to establish the validity of an adoption, *Held* (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the adoption was valid.

Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay.

* *Present* :—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

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Valubai v. Govind Kashinath⁽¹⁾ approved, as being based not on the particular degree of relationship, but upon the broad ground of the identity of *gotra*.

A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice ; and one of the trustees declined to act, *Held* that the consent of the declining trustee was not necessary, and the adoption made with the consent of the other four trustees was valid.

It is a general, salutary, and intelligible rule, and one substantially embodied in section 145 of the Evidence Act (I of 1872) that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and clear up the particular point of ambiguity or dispute : and the duty of enforcing such a rule is clear, especially where a witness' reputation or character is at stake. In this case, where the general principle of this rule and the specific provisions of section 145 had not been followed, but documents had been used for the purpose of contradicting witnesses without calling their attention to the portions of the documents so used, their Lordships were of opinion that the decision of the High Court on the evidence amounted to an inferential verdict of perjury against the witnesses which was not justified.

Semle : Where coercion, undue influence, fraud and misrepresentation are set up as rendering a transaction invalid, each one should be specifically pleaded, and a definite issue upon it settled. In attacking an adoption an issue, "whether the plaintiff is a validly adopted son," is not one on which any of the above grounds should be permitted to be raised by general allegations.

Wallingford v. Mutual Society⁽²⁾ per Lord Selborne ; and *Gunga Narain Gupta v. Tiluckram Chowdhry*⁽³⁾ referred to as to the defence of fraud.

APPEAL 33 of 1914 from a judgment and decree (23rd September 1910) of the High Court of Bombay which reversed a judgment and decree (31st July 1906) of the Subordinate Judge of Poona.

The main question for determination in this appeal was whether appellant 4, Shri Jagannath Vasudev Pandit Maharaj, was the duly adopted son of the late Vasudev Harihar Pandit, *alias* Shri Baba Maharaj.

The suit was brought by the appellants Bal Gangadhar Tilak, Ganesh Shrikrishna Khaparde, Shripad

⁽¹⁾ (1899) 24 Bom. 218 at p. 221. ⁽²⁾ (1880) 5 App. Cas. 685 at p. 697.

⁽³⁾ (1888) 15 Cal. 533 : L. R. 15 I. A. 119.

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Sakharam Kumbhojkar, and the abovenamed 4th appellant to establish the adoption of the 4th appellant, and to enforce the alleged rights of the other appellants to manage the estate of the deceased Baba Maharaj, who died on 7th August 1897 leaving him surviving his widow Shri Sakwarbai (referred to generally as Tai Maharaj) who was then enceinte, a daughter the second respondent Shri Saubhagyavati Shantaka, and two other daughters by a previous wife who were not concerned with this appeal. On the day of his death Baba Maharaj executed a will whereby he appointed the first three appellants, and two other persons, B. M. Nagpurkar and Rao Sahib Kirtikar trustees to carry on the management and administration of his estates after his death, and directed that if a son were not born to his wife, or if the son born should be short-lived, a boy should be adopted by his wife with the consent and advice of the trustees, and that the trustees should carry on the management of the estate on behalf of the son so adopted until he attained majority.

After the testator's death Rao Sahib Kirtikar declined to act as trustee or to join in an application for probate of the will, but the appellants 1 to 3 and Nagpurkar duly obtained probate from the District Court of Poona, and from the Kolhapur Court (where some of his properties were situate) and took charge of and proceeded to manage the estates.

On 18th January 1898 Tai Maharaj, the testator's widow, gave birth to a son who, however, died on 9th March 1898.

The circumstances relating and preliminary to the adoption of the 4th appellant, and the evidence as to his eventual adoption are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

Subsequently to that adoption the widow, Tai Maharaj, was induced, as alleged by Nagpurkar and other persons,

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to repudiate all that had taken place with respect to it, and eventually on 19th August 1901 she purported to adopt the first respondent, Shri Shrinivas Pandit, as a son to her husband.

Thereupon, on 23rd September 1901 the appellants instituted the suit, which gave rise to the present appeal, against Tai Maharaj, Nagpurkar, and Shrinivas Pandit for (*inter alia*) a declaration that the 4th appellant was the duly adopted son of the testator.

Tai Maharaj in her written statement denied that she had adopted the 4th appellant, and stated (*inter alia*) that she had no trustworthy person to advise her at Aurangabad (where the adoption of the 4th appellant had taken place); that the appellants 1 and 2 had threatened her that they would not return to Poona themselves, nor allow her to do so, until she had selected one of the Babre boys; that under the compulsion of these and other threats she was forced by those appellants to sign the documents, neither of which (though she was told they were about the selection of a boy) was read or explained to her; and she submitted that the documents were not binding upon her.

The other defendants filed written statements denying the adoption of the 4th appellant, and setting up that of the first respondent.

On 30th September 1903, during the pendency of the suit, Tai Maharaj died and her daughter the second respondent was substituted for her on the record and filed a written statement denying both the adoptions and claiming the estate of the testator in her own right.

The only issue now material of those settled was the 5th which was, "whether the plaintiff No. 4 is the validly adopted son of Baba Maharaj." There was no specific issue raised as to coercion or undue influence.

The Subordinate Judge found on the evidence that the corporeal giving and taking of the 4th plaintiff in adoption was proved, and that no religious ceremonies were legally necessary inasmuch as the boy adopted was of the same *gotra* as his adopter, and the adoption was intended to be complete without them. He believed the evidence of the plaintiffs 1 and 2 and their witness as to what had taken place at Aurangabad and disbelieved that of the witnesses called by the defendants. And he made a decree in favour of the plaintiffs

From that decision Shri Shrinivas Pandit, the third defendant, appealed to the High Court, and on the hearing of the appeal by Chandavarkar and Heaton, JJ., raised the point that the adoption was, if otherwise complete and valid, the result of undue influence exercised on the widow by the plaintiffs 1 and 2. For the plaintiffs it was contended that that point had not been pleaded or raised as an issue, that no evidence had been given of it, that it had not been argued in the lower Court, and that it ought not to be allowed to be raised for the first time on the hearing of the appeal ; but these objections were overruled.

The High Court held that there had not in fact been any corporeal giving and taking of the boy in adoption ; and that the adoption had been brought about by undue influence exercised by the plaintiffs 1 and 2 over the widow Tai Maharaj. The High Court accordingly reversed the decision of the Subordinate Judge, and dismissed the suit with costs.

On this appeal,

Sir H. Erle Richards, K.C., Sir W. Garth, and J. M. Parikh for the appellants contended that Jagannath Pandit, the fourth appellant, was the duly adopted son of the deceased Vasudev Pandit. The undue influence with which the appellants Tilak and Khaparde were

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charged should not have been allowed as a ground for the alleged invalidity of the adoption. The circumstances of the case made such a charge most improbable. The persons charged with using it had no personal interest in the adoption, and derived no benefit whatever from it, and the widow herself was anxious to make the adoption. There was in fact no evidence of any exercise of undue influence which could only have occurred by coercion or fraud. None of these grounds were pleaded, nor was any specific issue raised on them: the case of undue influence was only raised by general allegations in the High Court on appeal. Reference was made to *Abdul Hossein Zenail Abadi v. Charles Agnew Turner*⁽¹⁾ [LORD SHAW referred to *Wallingford v. Mutual Society*⁽²⁾], *Gunga Narain Gupta v. Tiluckram Chowdhry*⁽³⁾ was also cited, and as to raising and amending issues sections 146 and 149 of the Civil Procedure Code (Act XIV of 1882) were referred to. The High Court, therefore, should not have made the above grounds the foundation of relief to the respondents in respect of the invalidity of the adoption. *Bayabai v. Bala Venkatesh Ramakant*⁽⁴⁾ was distinguished.

The findings of the High Court as to the facts of the adoption (putting the boy into the lap of the adoptive mother, &c.) were contrary to the weight of evidence. They were founded on inferences drawn from portions of certain documents put in and the oral evidence of Tilak and Khaparde was disbelieved. But the portions of the documents which were said to discredit their evidence were never shown to them in cross-examination, as should have been done in accordance with the provisions of section 145 of the Evidence Act (I of 1872). On this ground also the decision of the High Court as

⁽¹⁾ (1887) 11 Bom. 620 : L. R. 14
I. A. 111.

⁽³⁾ (1888) 15 Cal. 533 : L. R. 15
I. A. 119.

⁽²⁾ (1880) 5 App. Cas. 685 at p. 697.

⁽⁴⁾ (1866) 7 Bom. H. C. R. Appx. 1.

to undue influence, and as to there having been no real giving and taking of the boy in adoption should be set aside. The documents themselves, it was submitted, were not inconsistent with the appellants' oral evidence, but on the contrary supported it.

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It was also contended that the performance of the ceremony of *datta homam*, among Maratha Brahmins in Bombay, was optional and not essential to the validity of the adoption, if, as was the case here, the boy to be adopted was of the same *gotra* as the adoptive father. The question was one on which the Indian authorities differ : see Trevelyan's Hindu Law (Ed. 1912) 147 : *Valubai v. Govind Kashinath*⁽¹⁾ ; *Atma Ram v. Madho Rao*⁽²⁾ ; *V. Singamma v. Vinjamuri Venkata-charlu*⁽³⁾ ; and *Govindayyar v. Dorasami*⁽⁴⁾. A formal giving and taking of the boy, as had occurred here, is considered to be a complete adoption amongst all classes in Bombay. West and Buhler's Hindu Law (3rd Ed.) 922. Where the *gotra* is different the ceremony of *datta homam* may be necessary. It was not necessary amongst Sudras because they have no *gotras* ; Strange's Hindu Law, Vol. I, 96 ; and Strange's Hindu Law, Vol. II, 89, 104 and 218 to 220. For the meaning of "*gotra*" reference was made to *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar*⁽⁵⁾ ; and Mitakshara, Chap. II, section 5 ; and also cited were Sarkar's Hindu Law (4th Ed.) 67, 68 : Stoke's Hindu Law Books 446, note 1 ; Vyavastha Chandrika, Vol. II, 79, 455, 456 ; and Sacred Books of the East, Vol. II, 127, and Vol. VII, 106.

Sir R. Finlay, K.C., De Gruyther, K.C., and G. R. Lowndes for the first respondent contended that the adoption was not completed. On the date when it was said to have been performed, the intention was only to

(1) (1899) 24 Bom. 218.

(3) (1868) 4 Mad. H. C. R. 165.

(2) (1884) 6 All. 276 at p. 278.

(4) (1887) 11 Mad. 5 at p. 10.

(5) (1914) 42 Cal. 384 : L. R. 41 I. A. 290.

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select a boy then, whom it was proposed to adopt on a later date. The resolution of the trustees of 18th June 1901 referred only to the selection of a boy to be approved of for the purpose of adoption, and it was submitted that nothing more than that was done. The giving and acceptance of the boy in adoption (placing him on the adoptive mother's lap) was admittedly necessary, but there was nothing in the evidence to show that it took place, at any rate not with the intention of constituting an adoption or with the express words necessary to make the adoption valid. Even if such giving and acceptance did take place, it was not done with the consent of Tai Maharaj and was therefore not her free act, but was brought about by the undue influence of the appellants Tilak and Khaparde. The High Court, it was contended, was entitled to rely on the documentary evidence, and to draw inferences from statements in them which justified it in discrediting the evidence of the appellants' witnesses. [LORD SHAW referred to section 145 of the Evidence Act, and said the statements in the documents could not be so used unless the witnesses had been given an opportunity of explaining them in accordance with the provisions of that section.] It was too late now to take such an objection which should have been taken when the documents were produced in the first Court. The High Court had rightly found that there was undue influence, and that there was no corporeal giving and acceptance of the boy in adoption. Reference was made to the Evidence Act, sections 17, 18, 21 and 32, and the Civil Procedure Code, 1882, section 59.

But the main contention was that, the parties being Brahmins, the adoption was not valid without the performance of the religious ceremony of *datta homam* which had been omitted. The performance of that ceremony was, it was submitted, among Brahmins

except in Madras, necessary to the validity of an adoption : see Mitakshara, Chap. I, section 11, paragraph 13 ; Dattaka Chandrika, section 2, paragraphs 5 and 17 ; Dattaka Mimansa, section 5, paragraphs 31, 45, 46, 47, and 56 ; Manu, Book IX, verse 182 ; West and Buhler's Hindu Law (3rd Ed.) pages 1082, 1084, 1123 to 1128, and 1130 ; and *Ganga Baksh v. Janki Singh*⁽¹⁾. The only cases in which the *datta homam* is dispensed with are those of a brother's son, and a daughter's son ; the former being regarded as one's own son, and the latter the son of a sonless father. The case of the daughter's son shows that the necessity for the ceremony of *datta homam* is not governed by the rule of the *gotra* being the same, because a daughter's son is not of the same *gotra* as her father, and the adoption of her son by her father necessitates a change of *gotra*. There are no other exceptions to the strict rule which makes the *datta homam* essential to the validity of an adoption. There was no authority binding on this board that the *datta homam* was unnecessary when the boy to be adopted belongs to the same *gotra* as his adoptive father. The cases of *Huebut Rao v. Govindrao*⁽²⁾ ; *Valubai v. Govind Kashinath*⁽³⁾ ; and *Atma Ram v. Madho Rao*⁽⁴⁾ are cases of the adoption of a brother's son, and are distinguishable from the present case. *Govindayyar v. Dorasami*⁽⁵⁾ followed *V. Singamma v. Vingamuri Venkatacharlu*⁽⁶⁾, which is based on the opinion of Mr. Ellis given in Strange's Hindu Law, Vol. II, 104 : it appeared therefore that the only authority for the doctrine of dispensing with the ceremony of *datta homam* is Mr. Ellis, a mere opinion only and not a judicial decision. Reference was also made to *Ranganayakamma v. Alwar*

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(1) (1887) Oudh. Rul. 1874 to 1893,

(3) (1899) 24 Bom. 218.

p. 81.

(4) (1884) 6 All. 276.

(2) (1821) 2 Borr. Rep. 83.

(5) (1887) 11 Mad. 5.

(6) (1868) 4 Mad. H. C. R. 165.

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Setti⁽¹⁾; *Ravji Vinayakrav Jaggannath Shankarsett v. Lakshmibai*⁽²⁾; *Thayammal v. Venkatarama*⁽³⁾; *Bhairabnath Sye v. Mahes Chandra Bhadury*⁽⁴⁾; *Sayamalal Dutt v. Saudamini Dasi*⁽⁵⁾; *Strange's Hindu Law*, Vol. II, 87 to 89, 103, 104, 113, 131, 218 and 219; *Sarkar's Hindu Law of Adoption* (Ed. 1891), 381; *Sarkar's Hindu Law* (4th Ed.), 160; *Mayne's Hindu Law* (7th Ed.), 193 note, 200; and "Hinduism and Brahminism," by Monier Williams (3rd Ed. 1887), 366. In this case there was not merely a non-performance of the *datta homam* as being unnecessary, for the parties had the intention of performing it, so that there was an omission to perform what had been considered necessary. That omission, it was submitted, invalidated the adoption, and justified the High Court in looking upon it with suspicion in the absence of any religious ceremony: see *Sootrugun Sutputty v. Sabitra Dye*⁽⁶⁾. If the ceremony of *datta homam* was not necessary, the actual giving and taking of the boy must be proved, see *Shoshinath Ghose v. Krishnasunderi Dasi*⁽⁷⁾; but that had not been done, the actual placing the boy on the lap of the adoptive mother not having been established by the evidence. The rule for investigating cases of conflicting evidence where perjury and fraud must exist on one side or the other given in *Meer Usd-oollah v. Mussumat Beeby Imaman*⁽⁸⁾ was referred to.

There was no evidence to show that Tai Maharaj was informed of her rights as being the heiress of her deceased son, and that her act in making the adoption would be to deprive her of the estate which had vested in her as heiress. Where there was such a concealment

(1) (1889) 13 Mad. 214 at p. 215.

(2) (1887) 11 Bom. 381 at p. 393.

(3) (1887) 10 Mad. 205.

(4) (1870) 4 Ben. L. R. 162 A. J.

(5) (1870) 5 Ben. L. R. 362 at p. 366.

(6) (1834) 2 Knapp. 287 at p. 290.

(7) (1880) 6 Cal. 381 at p. 388:
L. R. 7 I. A. 250 at p. 255.

(8) (1836) 1 Moo. I. A. 19 at pp.
44, 45.

and suppression of facts from a widow exercising her right to adopt a son, the Court declared the adoption invalid : see *Bayabai v. Bala Venkatesh Ramakant*⁽¹⁾.

A. M. Dunne and *Abdul Majid* for the second respondent contended that the adoption was invalid as not having been made with the "consent and advice" of the trustees named in the will. That condition was in the mind of the testator at the time of his making the will ; and the intention of the testator must be looked at and carried out. An adoption made without the consent of all the trustees could not therefore be valid. The adoption was not in accord with the will. Reference was made to *Narasimha v. Parthasarathy*⁽²⁾ ; *Beemchurn Sein v. Heeraloll Seal*⁽³⁾ ; and *Amrito Lal Dutt v. Surnomoye Dasi*⁽⁴⁾. The authority given to the widow to adopt must be strictly pursued : *Mutasaddi Lal v. Kundan Lal*⁽⁵⁾.

The appellants were not called on to reply.

LORD SHAW :—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 23rd September 1910, which reversed the decree of the First Class Subordinate Judge at Poona, dated 31st July 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudev Harihar Pandit, *alias* Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds--first, that it was never completed in fact.

(1) (1866) 7 Bom. H. C. R. Appx. 1.

(2) (1913) 37 Mad. 199 at p. 224 :
L. R. 41 I. A. 51 at pp. 73, 74.

(3) (1867) 2 Ind. Jur. N. S. 225 at
p. 227.

(4) (1900) 27 Cal. 996 at p. 1002 :
L. R. 27 I. A. 128 at p. 133.

(5) (1906) 28 All. 377 at p. 380.

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This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular he was not taken upon the lap of the adoptive mother. Secondly, that the religious ceremony of *datta homam*, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The third ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion, and undue influence are all mixed together. The disentangling of these separate and separable grounds of action must undoubtedly have caused certain difficulties in the Court below. But the challenge appeared to their Lordships to preserve even at the bar of the Board this mixed or jumbled character.

The facts of the case, briefly stated, are these : The late Baba Maharaj was a First Class sardar of the Deccan. He died at Poona on 7th August 1897, leaving a young widow, Tai Maharaj.

At the date of his death he made a will appointing five gentlemen as his trustees. One of these, Rao Sahib Kirtikar declined to act ; the other four obtained probate of the will on 2nd December 1897. These were Messrs. Tilak, Khaparde and Kumbhojkar, the

appellants. The fourth, Mr. Nagpurkar, while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the will.

In the will the clause material to the questions of adoption and succession is as follows :—

“ My wife, Saubhagyavati, Shri Sakvarbai, is now pregnant. If she does not give birth to a son, or if the son after birth is short-lived, then, for the purpose of continuing the name of my family with the *Vichare* of the above-mentioned gentlemen, a boy should be given as often as may be necessary in adoption on the lap of my wife in accordance with the *Shastras*, and the above-mentioned *Panch* should, on behalf of that son, carry on the management of the immovable and movable estate until he attains majority.”

On 18th January 1898 the widow gave birth to a son, but he died within two months thereafter, namely, on the 9th March. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. And it is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent enquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On the 18th June 1901 a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none were approved. The minute in this particular is

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of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground of their being too old. One boy, the youngest named, of eleven years, being, however, stated to be in point of age suitable, although delicate. The minute then proceeds :—

“The only family which remains, therefore, is that descended from the brother of Shri Siddeshwar Maharaj at Babre. It is not yet known whether there is a boy or not in that family. But if there is a boy of that family, fit in point of age, &c., for adoption, it is our unanimous opinion that one should not be taken from any other family. And Shri Tai Maharaj is of the same opinion.

“Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganesh Shrikrishna Khaparde should both go to Babre, select boys, and return after settling as regards that family.

“Shri Tai Maharaj should go, see boys, and approve.”

It should be mentioned that the trustees were, and had been since the testator's death, duly administering the testator's estate.

What followed upon the proceedings of the 18th June was that Messrs. Tilak and Khaparde accompanied the widow to Aurangabad, where the widow remained ; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath ; and her personal likings appeared to point in the same direction.

All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's

wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at Aurangabad it is sufficient to say that, in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and the horoscopes of the astrologers all pointing in one direction, on the 27th June a meeting of the Shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he agreed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a Mouglai, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child these documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by its natural father to its adopted mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus on occasion of adoption and—all being completed—the formal ceremonies and festivities were

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postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, and he has weighed and considered every argument presented, and he comes to the conclusion that adoption was in fact completed. Notwithstanding the judgment of the learned Judges of the High Court of Bombay, their Lordships have no hesitation whatever in entirely agreeing with the Judge of first instance. Reference in a little time will be made to the reasons assigned by the High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption, and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high position, and some of them of learning and legal training, are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper, to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of

the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of ten or twelve witnesses, five witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not was disbelieved by the Judge of first instance, a verdict with which the High Court saw no ground for interfering.

It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the word "selected" and "decided" refer to something in the future. And it is also undoubtedly true that both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lordships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says :

"Here there was a clear direction of the husband to his wife to adopt, the wife after his death was anxious to carry out the direction. There is no evidence to prove that any effort or cajolery was practised upon her, or that there was any suppression or concealment of facts from her; the plaintiffs had no personal interest whatever."

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In another passage of his judgment he remarks :

"The evidence clearly shows, and it is undisputed, that on the 27th there was selection and verbal gift, and acceptance, and preparation of necessary documents. On the 28th there was execution of documents under corporeal acts of giving and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can be reasonably suggested for them maintaining or testifying that the adoption of the boy mentioned was made, except that this represented the actual truth which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, ten or twelve persons in all.

"The account unquestionably, to my mind,"
says Mr. Justice Chandavarkar,

"given by the witnesses appears to be a true account of many of the series of events, and a false account of at least one, and that the most important."

This event is the taking of the child on the lap. Later on in his judgment he states :

"We are driven to believe that a considerable number of men of good position have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying such a verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Mr. Justice Chandavarkar observes that—

"they were men of mature years, of exceptional education and mental qualities, lawyers and men of affairs of great repute and good standing, and both men of dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is *a priori* difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned Judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurungabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. And on the 19th August she went through the form of another adoption, *viz.*, of Bala Maharaj—a married man older than herself—as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on 30th September 1903. Her daughter who was, on her death, admitted to the suit as defendant, challenges not only the first adoption, but the second adoption also—her interest being to maintain that the provisions of the testator's will with regard to adoption had failed, that the widow became the owner of the estate as heiress to her infant son who died, and that the property passes in this way to her heir.

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It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury. Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned Judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds—

“when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way, &c.”

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses, given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It

was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings, as above described, were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned Judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear.

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Fortunately the law of India pronounces no uncertain sound upon the same matter. By section 145 of the Indian Evidence Act, 1872, it is provided that—

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—none the less sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton J. deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which

are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced.

The learned Judges have come to a conclusion which would be in some respect in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of *datta homam*, which ceremonial is declared to be essential to its legal validity.

Datta homam is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on

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the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these—except when the law is clear—into the legal sphere, so as to affect or impair personal or patrimonial rights. The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshammamma*⁽¹⁾ and by Mr. Ameer Ali in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*⁽²⁾.

The former case had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahminical influence was most predominant one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes :

“The further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers, accustomed to treat as law what they found in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual

⁽¹⁾ (1899) 22 Mad. 398 : L. R. 26
I. A. 113 at p. 126.

⁽²⁾ (1914) 42 Cal. 384 at p. 401 :
L. R. 41 I. A. 290 at p. 300.

judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers."

The case resulted in the decision that the adoption of an only son is not null and void under the Hindu law.

The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvas or call in question any dicta upon that general point, nor does the question arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar v. Dorasami*⁽¹⁾ or of the Madras High Court in *V. Singamma v. Vingamuri Venkatacharlu*⁽²⁾, both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father. It is an admitted fact that this was so in the present case. And their Lordships have come clearly to the conclusion that where this is so in fact then the Law of India is that the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a nephew, or of a daughter's son. In decided cases this may have been the relationship in fact, but the principle of all the decisions, and in their Lordships' opinion, of all the authorities, is that within the same

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(1) (1887) 11 Mad. 5.

(2) (1868) 4 Mad. H. C. R.165.

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gotra the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Chief Justice Jenkins, in the case of *Valubai v. Govind Kashinath*⁽¹⁾, the decision being to the effect that among Brahmins in the Presidency of Bombay, the performance of the *datta homam* ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship but upon the broad ground of the identity of *gotra*.

Mr. Colebrooke's annotation upon Mitakshara, Chap. II, s. 5, is as follows :—

"*Gotraja* or persons belonging to the same general family (*gotra*) distinguished by a common name, these answer nearly to the gentiles of the Roman law."

A good illustration of the point has reference to the law applicable to the Sudra caste. The use of the *datta homam* is not necessary for adoption within that caste, and why? The explanation is given in a sentence by Strange in his "Hindu Law," volume II, page 89, in which it is laid down that—

"Ceremonial adoption cannot be necessary in the case of a Sudra, since, by the *datta homam*, the adopted son is converted from the stock (*gotram*) of the natural to that of his adoptive father; and Sudras have no *gotra*."

It may be added that in the treatment in the same volume, page 104, of the celebration of the Upanayana rite, or the investiture with the sacred thread, this is laid down :—

"With respect to the ineligibility of a person for adoption, on whom the *Upanayana* rites have been performed, it is much disputed.... The more reasonable opinion would appear to be that he is eligible, if of the same *gotra* (family); ineligible if of a different *gotra* from the adopter; for if of the same *gotra*, the *datta homam*, though proper, is not necessary."

(1) (1899) 24 Bom. 218 at p. 221.

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in the last-mentioned judgment of the learned Chief Justice Jenkins.

In their opinion accordingly this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne⁽¹⁾ that—

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

The law of India is in no way different from this, and it has been decided over and over again, *e. g.*, in *Gunga Narain Gupta v. Tiluckram Chowdhry*⁽²⁾.

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any one of the well-

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⁽¹⁾ See *Wallingford v. Mutual Society* (1880) 5 App. Cas. 685 at p. 697

⁽²⁾ (1888) 15 Cal. 533 : L. R. 15 I. A. 119.

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known categories of attack was settled for trial, the only issue on the subject being—Whether the plaintiff, No. 4, is a validly-adopted son of Baba Maharaj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this : The will of the testator prescribing an adoption was clear ; the wish of the widow and the trustees alike to follow it was clear ; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the *gotra*, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her, or that there was any suppression or concealment of facts from her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree

with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There was nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect that—

“The question here is difficult, she was indeed willing to adopt, but was she a free agent when she adopted the fourth plaintiff, assuming that she adopted him, or was she forced into it against her will by unconscientious means used by the first two plaintiffs, that is, Messrs. Tilak and Khaparde, and unfair advantage taken by them of her ignorance and youth, and of other fiduciary relations between them?”

The citation just made is from the notes of Mr. Justice Chandavarkar. With much respect to the learned Judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned. It is needless to ask whether this implies fraud because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout their whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import *pro tanto* a disqualification and disability into the position of reputable men.

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A reference is made in the Court of Appeal to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows :— Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise.

The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate, by violation of her husband's dying wishes, and at the price of sacrificing his soul's happiness. Their Lordships are not of opinion that it was any part of the duty of the trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor second adoption was valid. The only separate

point put forward was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees ; but in their Lordships' opinion that question does not arise ; because he did in fact not dissent, but consent. His dissent, or alleged dissent, was subsequently made under circumstances in which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for the appellants : Messrs. *Downer and Johnson*.

Solicitors for the first respondent : Messrs. *T. L. Wilson and Co.*

Solicitors for respondent Shri Soubhagyavati Shantaka : *Mr. E. Dalgado*.

Appeal allowed

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APPELLATE CIVIL.

Before Mr. Justice Batchelor.

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February 19.

TIMANGOWDA BIN VENKANGOWDA (ORIGINAL PLAINTIFF), APPELLANT,
v. BENEPGOWDA BIN CHHENAPGOWDA AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

*Transfer of Property Act (IV of 1882), section 54—Sale—Agreement to
reconvey—No bar to recovery of possession—Construction of statute.*

An agreement by the plaintiff to reconvey the property to the defendant made contemporaneously with the sale-deed cannot be pleaded in bar of plaintiff's right to recover possession under the deed of sale.

The provisions of section 54 of the Transfer of Property Act are imperative.

The express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts.

Kurri Veerareddi v. Kurri Bapireddi⁽¹⁾ followed.

SECOND appeal from the decision of F. K. Boyd, District Judge of Bijapur, varying the decree passed by D. V. Yennemadi, Additional Subordinate Judge of Bagalkot.

The plaintiff sued to recover possession of the house in dispute from the defendants. He alleged that the house belonged to defendants 1 to 3, that the defendants 1 and 2 sold the house and other land to him on 30th November 1907; and that the defendants took forcible possession of the house and let it to defendant No. 4.

The defendant No. 1 who alone appeared denied the claim of the plaintiff and contended that plaintiff was never in possession of the plaintiff house although a sale-deed in respect thereof was passed to him; that the plaintiff had agreed to reconvey the house on payment of Rs. 400 and put off the execution of the deed of reconveyance; that the plaintiff could not therefore claim possession.

* Second Appeal No. 941 of 1913.

⁽¹⁾ (1906) 29 Mad. 336.

The Subordinate Judge found that the agreement to reconvey the property to defendant 1 and the payment of Rs. 400 to plaintiff by him were proved and dismissed the suit.

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On appeal the District Judge agreed with Subordinate Judge's finding as regards the covenant of reconveyance but held that the payment of Rs. 400 was not proved and therefore amended the decree by directing that plaintiff was entitled to possession of the house in suit only on failure of payment of Rs. 400 by defendant No. 1.

The plaintiff appealed to the High Court.

P. D. Bhide for the appellant (plaintiff) :—An agreement to reconvey is no defence to a suit for possession brought by my client on the strength of the sale-deed passed in his favour. Moreover, it is found in my favour that the price of reconveyance is not paid. When there is a strict provision of law and statute it cannot be overridden by reference to equitable principles. A sale as well as a reconveyance can only be effected by registered instrument under section 54 of the Transfer of Property Act : *Kurri Veerareddi v. Kurri Bapireddi*⁽¹⁾ ; *Papireddi v. Narasareddi*⁽²⁾ ; *Gopalan Nair v. Kunhan Menon*⁽³⁾ ; *Karalia Nanubhai v. Mansukhram*⁽⁴⁾. By a mere agreement to reconvey no interest in the property or charge is created. *Karalia Nanubhai v. Mansukhram*⁽⁴⁾ was distinguished in *Lalchand v. Lakshman*⁽⁵⁾ on the ground that there was payment of consideration, and a registered agreement had been obtained pending the suit.

K. H. Kelkar for the respondent (defendant No. 1) :—We can successfully set up the plea of an agreement to

⁽¹⁾ (1906) 29 Mad. 336.

⁽³⁾ (1907) 30 Mad. 300.

⁽²⁾ (1892) 16 Mad. 464.

⁽⁴⁾ (1900) 24 Bom. 400.

⁽⁵⁾ (1904) 28 Bom. 466.

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reconvey. *Lalchand v. Lakshman*⁽¹⁾ and *Karalia Nanubhai v. Mansukhram*⁽²⁾ are authorities for the view that defendant can defend his possession as against the plaintiff on the ground that possession had been delivered over to him as part and parcel of the agreement to reconvey. In this case there has been a part performance and it would, therefore, be inequitable to refer the defendant to a separate suit for specific performance to which the plaintiff would have no defence.

BATCHELOR, J.—The facts upon which this appeal has to be decided lie within very small compass, and may be briefly stated. The plaintiff sued to recover possession of a house, and admittedly he purchased that house from the defendants under a registered sale-deed. But the defendants are still in possession, and the contesting defendant, that is the 1st defendant, met the plaintiff's claim with the plea that the defendant was entitled to retain possession, because the plaintiff had agreed to reconvey the house to the defendant on payment of Rs. 400, and this sum of Rs. 400 had been paid. The finding of fact of the lower appellate Court is, however, that the Rs. 400 have not been paid, so that in the defendant's favour there is this circumstance, and nothing more, that the plaintiff is found to have agreed to reconvey on payment of Rs. 400. In this state of the facts the learned District Judge has made a decree directing that the plaintiff is entitled to recover possession of the house if, and only if, the defendant fails to pay him Rs. 400 within a period of three months. The decree provides further that if that payment is made within the time limited, then the defendant is entitled to retain possession.

The question of law raised in these circumstances is whether, on the findings stated, the agreement by the

⁽¹⁾ (1904) 28 Bom. 466,

⁽²⁾ (1900) 24 Bom. 400.

plaintiff to reconvey to the defendant can be pleaded in bar of the plaintiff's present right to recover possession of the house under his purchase. If that question had to be decided on grounds of general principle, or by reference to equitable doctrines, much might be said in favour of the decree which the District Judge has made, for we are, for the purposes of the present argument, entitled to assume that the plaintiff would have no answer to a suit brought by the defendant for specific performance, and, upon that assumption, it would seem that the District Judge's decree operates to effect speedy and complete justice between the parties. But the question, as it seems to me, is not open to be decided on any such broad principles, but is concluded by the express words of the statute governing such transactions. That is section 54 of the Transfer of Property Act. That section lays down that "a contract for the sale of immoveable property does not, of itself, create any interest in or charge on such property." And it is clear that if these words are to be read strictly, there is no defence to the plaintiff's suit in this case. The exact question now under consideration occurred in Madras, and was fully considered by a Full Bench of that High Court in *Kurri Veerareddi v. Kurri Bapireddi*⁽¹⁾, where the learned Judges adopted the strict interpretation of this paragraph of section 54, and held that a contract of sale, followed by delivery of possession, does not, when there is no registered sale, create any interest in the property agreed to be sold, and cannot, even if enforceable at the date of suit or decree, be pleaded in defence to an action for ejectment by a person having a legal title to recover. I have studied the judgments which the learned Judges delivered in this case, and no good

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purpose would be served by any attempt to repeat the arguments which were there used. It is enough for me to say that I follow this ruling, not only because it is a ruling of a Full Bench, but because my own opinion is in entire agreement, both with the decision come to, and with the reasoning upon which that decision is grounded. It will be observed that the judgments of Sir Arnold White and Mr. Justice Subrahmaniam Ayyar deal with the apparent difficulty caused by the decision of the Privy Council in *Immudipattam Thirugnana v. Periya Dorasami*⁽¹⁾, and I agree in the construction there placed upon the language used by their Lordships of the Judicial Committee. The judgments of the learned Judges of the Madras Court contain, as it seems to me, convincing arguments for the view that the express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts; and I find that since the Madras case was decided, further authority for this view has been supplied by a later decision of the Privy Council. I refer to the case of *Mulraj Khatau v. Vishwanath Prabburam Vaidya*⁽²⁾, which, as the judgments of the High Court show, was a strong case for the application of equitable principles, if recourse could ever be had to such principles for the purpose of qualifying the clear words of the Indian Statute. But their Lordships of the Privy Council held fast to the exact terms of section 130, sub-section 1, of the Transfer of Property Act, and in reversing this Court's decision, observed that the error arose from the learned Judges not having appreciated that the proceedings under that section precluded the application in India of the principles of English law on which they based their decision.

⁽¹⁾ (1900) L. R. 28 I. A. 46 : 24 Mad. 377. ⁽²⁾ (1912) 37 Bom. 198.

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It appears to me, therefore, that the proper decision of this appeal is to hold that there is no escape from the plain language of section 54 of the Transfer of Property Act, and that in consequence the lower appellate Court's decree must be reversed. There is not, so far as I am aware, any Indian decision which is in conflict with the ruling in *Kurri Veerareddi v. Kurri Bapireddi*⁽¹⁾, and the case of *Karalia Nanubhai v. Mansukhram*⁽²⁾, on which Mr. Kelkar relied for the defendants, is distinguishable, inasmuch as in that case the Court had before it, not only the agreement, coupled with possession, but the fact of the payment of the whole of the purchase money. I cannot, therefore, regard the Bombay decision as modifying or casting doubt upon the decision in *Kurri Veerareddi v. Kurri Bapireddi*⁽¹⁾.

For these reasons, I reverse the decree of the District Court, and make a decree as prayed for by the plaintiff. The plaintiff must have his costs in this Court, and there will be no order as to any other costs. The amount of mesne profits will be determined in execution.

Decree reversed.

J. G. R.

⁽¹⁾ (1906) 29 Mad. 336.

⁽²⁾ (1900) 24 Bom. 400.

APPELLATE CIVIL.

Before Mr. Justice Batchelor.

1915.
March 5.

DAYA KHUSAL (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* BAI BHIKHI, DAUGHTER OF FAKIRA MOVJI (ORIGINAL DEFENDANT 2, SUBSEQUENTLY ADDED AS PLAINTIFF No. 2), RESPONDENT.*

Matadars Act (Bom. Act VI of 1887), sections 9 and 10⁽¹⁾—“Heir next in succession”—Succession to matadari property—Succession not confined to the limits of matadar family—Heir to be ascertained by reference to the personal law governing the parties.

One R, the representative Matadar, who inherited his Mata from his mother's side, having died, disputes arose as to the succession to the Matadari property between B, who was the daughter of a maternal cousin of R, and D who was the grand-nephew of R.

Held, that D was the preferential heir to B, as in order to ascertain the heir of a deceased Matadar, the Court was not confined to the limits of the Matadar family and should have in the first instance reference to the personal law which governed the parties.

SECOND appeal against the decision of Motiram S. Advani, District Judge of Surat, confirming the decree passed by Naginlal V. Desai, Subordinate Judge of Olpad.

The plaintiffs sued for (1) a declaration that defendant No. 1 was not the heir to the Mata of Ratanji and that

* Second Appeal No. 976 of 1913.

⁽¹⁾ Sections 9 and 10 of Matadars Act (Bom. Act VI of 1887) are as follows :—

9. On the death of a representative or other matadar, the fact shall be reported by the village officers to the Collector, and the name of the heir next in succession, or, if there are two or more heirs of equal degree, the name of the senior heir, shall, subject to the provisions of section 2 of Bombay Act No. V of 1886 (an Act to amend Bombay Act III of 1874) be registered in his stead.

10. If at any time any person shall, by production of a certificate of heirship, or of a decree or order of a competent Court, satisfy the Collector that he is entitled to have his name registered under section 7 (*b*) or section 9 in preference to the person whose name the Collector has ordered to be registered, the Collector shall cause the entry in the register to be amended accordingly.

plaintiff 1 or any of the other plaintiffs was the heir, (2) for an injunction restraining him from enjoying the watan property specified in the plaint alleging that Sandhier was a Matadari village and that there was one Matadari family there known as Ramji's family; that in this family of Ramji one Ratanji Kasanji had a Mata, that Ratanji died in 1909 and that according to law and custom of the family defendant 1, who was a descendant of Ratanji's step-brother and was in no way descended through his mother or father from the Matadari family, had no right to inherit the Mata in question; that the Bombay Government had passed a resolution declaring defendant 1 to be the heir to Ratanji's Mata and thereby reversed the orders passed against him by the Collector of Surat and the Commissioner, Northern Division.

Defendant No. 1 contended that the Court had no jurisdiction to hear the suit; that there was no custom as alleged in the plaint; and that he was the heir next in succession under section 9 of Act VI of 1887 as the grand-nephew of Ratanji.

The Subordinate Judge held that plaintiff 2 was the heir next in succession and that the Court had jurisdiction to determine that plaintiff 2 was such an heir in preference to defendant 1. He observed as follows:—

"What strikes one in this case is that defendant 1 has not been able to find out a *single instance* in which an heir under the general Hindu Law succeeded to a mata even though he was not member of watandar family, *i. e.*, even though not descended from that family through a male or female. Defendant 1 (exhibit 72) admits that in the inquiries he has made he finds that an heir to a mata has been a descendant (through a male or female) of the matadar family * * *. Thus one must take it that in all these matadari villages no one, not descended from a male or female of matadar's family, succeeds to a mata * * *."

"What then is the popular meaning of the word family? In the same dictionary it is shown that it means children and descendants. But it is not necessary, I think, to go so far. When the Legislature have expressly said

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that 'family' shall include 'each of the branches of the family descended from an original watandar' it must on the principle of *expressio unius*, etc., be presumed that it intended to exclude all branches not so descended. I think collaterals not so descended do not come within the definition. Defendant 1 does not belong to any branch so descended. He is not a watandar of the same watan, for a watandar is defined to mean 'a person having an hereditary interest in a watan'.

Defendant 1 has no such hereditary interest and I have shown above that he cannot be said to belong to this family. The 'heir next in succession' must be sought for within the family and not outside it. Defendant 1 may be a collateral heir and the nearest one to Ratanjee, but he is not of this family, for he is not descended from it and looking to the scheme of the Act, I think defendant 1 is not the heir to Ratanjee's mata.*

On appeal by defendant 1, the District Judge confirmed the decree of the Subordinate Judge on the following grounds :—

"So far the succession to a mata is concerned the law on the subject is embodied in the Matadars Act and the question has to be determined according to that Act."

The defendant 1 preferred a second appeal.

Dewan Bahadur G. S. Rao for the appellant :—I submit that for the purposes of succession, the ordinary Hindu Law applies. The Matadars Act merely defines the position, rights and obligations of a Matadar. It does not regulate succession. There is no indication in the Act to suggest that the heir next in succession is to be one not under the ordinary Hindu Law. The Court has to construe sections 9 and 10 of the Matadars Act and the words heir next in succession. Section 9 does not exclude the ordinary personal law of the parties. The appellant Dahya is under the Hindu Law the next heir to Ratanji : *Bai Devkore v. Amritram Jamiatram*⁽¹⁾.

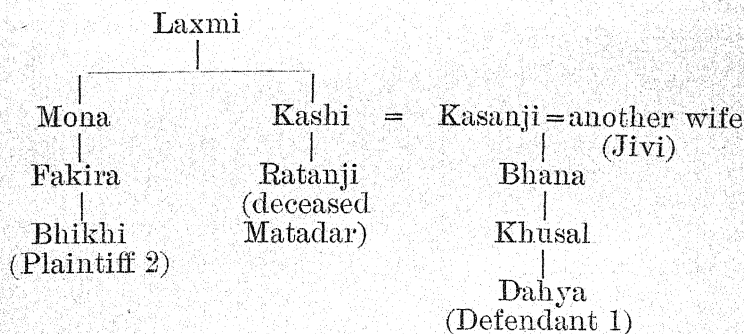
T. R. Desai for the respondent :—Dahya does not belong to the family of Laxmi to whom the Mata

⁽¹⁾ (1885) 10 Bom. 372.

belonged, and if his name is enlisted in the register, it would be adding to the number of the Matadar family; that is what is not contemplated by Watan Act: *Chinava v. Bhimangauda*⁽¹⁾. Under the explanation clause of Matadars Act, certain provisions of the Watan Act have to be read as if part of the Act. Can it be said that Dahya is a watandar of the same watan? I submit not. He cannot, therefore, take either under the will of deceased Ratanji or as heir under the Hindu Law.

Rao in reply.

BATCHELOR, J.—This is a case in which the point involved is as to the right of succession to certain Matadari property. The appeal arises in the following state of facts. The genealogy of the parties is as follows:—



The present contest is between Bhikhi, the original 2nd plaintiff, and Dahya the 1st defendant. Ratanji Kasanji, the representative Matadar, died in 1908 or 1909 without issue. Disputes as to the succession to the Matadari property immediately arose, and the Collector of the district and the Commissioner of the division decided against the claim of the 1st defendant. The Government of Bombay, however, in 1912 took the other view, and reversing the orders of the Collector and the Commissioner declared the 1st defendant to be the next

⁽¹⁾ (1896) 21 Bom. 787.

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heir of the deceased, and accordingly ordered the entry of his name in the Matadari register. Thereupon Bhikhi and another brought the present suit for a declaration that one of the plaintiffs, and not the 1st defendant, was entitled to succeed to the Matadari property, and both the trial Court and the lower appellate Court have decided in favour of the plaintiff Bhikhi. My own view is that the appellant Dahya is entitled to succeed.

The question is regulated by sections 9 and 10 of Bombay Act VI of 1887. Section 9 enacts, so far as it is relevant to our present purposes, that on the death of a representative or other Matadar, "the name of the heir next in succession, or if there are two or more heirs of equal degree, the name of the senior heir, shall, subject to the provisions of section 2 of Bombay Act V of 1886 be registered in his stead." I apprehend as a matter of grammatical construction that the words "subject to the provisions of section 2 of Bombay Act V of 1886" govern as well the case of a single heir as the case of two or more heirs of equal degree; but the point is not now material, as neither side contends that the decision of the present appeal is affected by the modification of the rule introduced by the incorporation of section 2 of Bombay Act V of 1886. It is admitted, and, as the genealogy shows, rightly admitted, that if the ordinary Hindu Law is to be enforced, Dahya, and not Bhikhi, is the preferential heir; for Dahya is a *sagotra sapinda* of the deceased Ratanji's, whereas Bhikhi is a *bhinnagotra sapinda*. The lower Courts have decided in favour of Bhikhi on the sole ground that, as they understand the scheme of the Act, it overrides the general law, and provides that, in order to ascertain the heir of a deceased Matadar, the Court is confined to the limits of the Matadar family and can never travel outside those limits. I am obliged to

differ from the learned Judges below because I find nothing in the Act to justify this view, while if that had been the intention of the draftsman, it would have been easy to express it beyond the possibility of misconception. Not only is there no clear provision of that sort, but the section declares that the name of the heir next in succession in such a case as this shall be registered instead of the name of the deceased. Taking these words in their natural meaning they seem to me to denote that the heir is to be ascertained in the first instance by reference to the personal law which governs the parties, for instance, the Hindu Law in the case of Hindus and the Mahomedan Law in the case of Mahomedans. And by section 10 it is enacted that if at any time any person shall by production of a certificate of heirship, satisfy the Collector that he is entitled to have his name registered in preference to the person whose name the Collector has ordered to be registered, the Collector shall cause the entry in the register to be amended accordingly. Again the section contains no words which indicate that the Court in its inquiry as to who is entitled to be considered the heir shall adopt any other principles than those which a Court would necessarily follow unless plainly directed otherwise.

It was urged that in *Chinava v. Bhimangauda*⁽¹⁾, a case decided with reference to the Watan Act, this Court recognised that one leading object of this Watan legislation is to keep the Watan property intact in the same family. That is perfectly true, but the question still is how far this object is to be pursued, whether within the limitations expressed in the statute, or beyond those limitations into an unexpressed disregard of the established principles by which heirship is determined. I cannot find in the Act any warrant for this larger extension. And it seems clear that the Act

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cannot avail to prevent the occasional devolution of the Mata outside the original family, as, for instance, where a deceased Matadar leaves a daughter as his sole heir. It was urged by Mr. Desai that to allow the appellant Dahya now to succeed would have the effect of creating a new Matadar family, but the answer to that appears to me to be that the effect will rather be that Dahya will come from outside into the already existing Matadar family. Then Mr. Desai sought to support his case by reference to the addition made to section 2 of the Matadars Act by Bombay Act IV of 1910 which provides that in determining who is the heir to a Matadar for the purposes of the Act the rule of lineal primogeniture shall be presumed to prevail in the Matadar family. But that carries the case no further than this, that where there are lineal descendants of a deceased Matadar the rule of succession will be by primogeniture. Here we are dealing with a case where there are no lineal descendants. On these grounds, as I am unable to discover in the Matadars Act any authority for the view that the Court in ascertaining the heir of a deceased Matadar is disabled from looking outside the Matadar family, I am compelled to give my decision in favour of the appellant Dahya. The result is that this appeal is allowed, the decree of the lower appellate Court is reversed and the plaintiff's suit is dismissed with costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

RAMCHANDRA NATHA AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY (ORIGINAL DEFENDANT), OPPONENTS.*

1915.
March 5.

Indian Railways Act (IX of 1890), section 72—Rule 2† made under section 47, sub-section (1), clause (f)—Rule not valid—Delivery of goods to be carried by Railway administration—Grant of railway receipt not essential to complete delivery.

The plaintiffs brought certain goods to the railway premises and handed a consignment note to the clerk of the Railway Company. No receipt was given as the goods were not weighed and loaded. In the meanwhile, a fire broke out on the premises and destroyed the goods. The plaintiffs having sued the Railway Company for the loss of goods, the lower Court held that the Company was not liable for the loss in absence of a railway receipt, as provided for in Rule 2 framed under section 47, sub-section (1), clause (f), of the Indian Railways Act (IX of 1890). On plaintiffs' application under Extraordinary Jurisdiction :—

Held, that the commencement of the liability of the Company for goods delivered to be carried under section 72 was in no way dependent upon the fact of a receipt having been granted, but must be determined on evidence quite independently of Rule 2 under section 47, sub-section (1), clause (f), of the Indian Railways Act (IX of 1890).

Held, also, that inasmuch as Rule 2 sought to define and by defining changed what would otherwise be the meaning of section 72 of the Act the rule was bad.

Per HEATON, J. :—“ A ‘delivery to be carried by railway’ (within the meaning of section 72 of the Indian Railways Act, 1890) means something more than a mere depositing of goods on the railway premises : it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case ; but it certainly may be completed before a railway receipt is granted.”

* Civil Extraordinary application No. 218 of 1914.

† The rule in question runs as follows :—

“ Goods will, in all cases, be at owner's risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorized railway servant.”

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Per SHAH, J. :—"The delivery contemplated by section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of carrying the same by railway. Such acceptance may be expressed or implied in a variety of ways by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend upon the circumstances of each case and the usual course of business of the railway administration as to whether the goods can be said to be delivered to be carried by railway under section 72 of the Act."

THIS was an application under extraordinary jurisdiction under section 115 of the Civil Procedure Code (Act V of 1908).

The plaintiffs took 37 empty wooden casks to the goods yard of the Great Indian Peninsula Railway Company at Sholapur, and made out a consignment note. The note was received by the Company's clerk who numbered it. No railway receipt was given for the casks as they were not weighed and loaded.

Whilst the casks were thus lying in the goods yard, a fire broke out, and consumed 26 out of 37 casks.

The plaintiffs filed a suit against the Railway Company to recover the damage caused by the loss of the 26 casks. The Railway Company contended that they were not liable for the loss, inasmuch the casks were not delivered to them, no receipt having been granted for the same. They also relied on Rule 2 framed under section 47, sub-section (1), clause (f), of the Indian Railways Act, 1890.

The learned Judge (H. B. Tyabji) held that the Company were not liable for the loss of goods which were not delivered to them. This decision was confirmed by a Full Court of the Bombay Court of Small Causes on the following grounds :—

"We do not think the rule saying the Railway Company will only be responsible when a Railway receipt is passed is *ultra vires* especially as it is admitted it has been sanctioned for this particular railway by the Governor

General in Council (*Banna Mal v. Secretary of State*, 23 All. 367, which is inconsistent with 31 Cal. 951).

"We do not think there was any entrustment to the Railway in the case. The weighing and marking of the goods is to identify the goods and ascertain the freight and does not amount to taking them over from the consignor. The goods lie in the railway yard at his risk and that yard is merely a convenience where goods can be placed until the Railway Company chooses to take delivery of them. The railway had not accepted the goods to be carried (see 23 All. 367).

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The plaintiffs applied to the High Court.

Jinnah, with *B. G. Kher*, for the applicants:—The goods were taken to the Railway goods-shed, a consignment note was duly handed up, and they were weighed and marked. They were then left in the railway shed to be loaded. The receipt for the goods was asked for but was not given. The goods were thus "delivered to be carried by railway" within the meaning of section 72 of the Indian Railways Act, 1890.

The rule No. 2 made by the Railway Company under section 47, sub-section (1), clause (f), of the Act is *ultra vires* being inconsistent with the provisions of section 72.

The granting of the railway receipt is not essential to complete delivery of goods to the Railway Company. The word 'delivery' is not defined in the Indian Railways Act, 1890. There is nothing in the Act or in the Rules to compel the Railway Company to grant a receipt. They should not, therefore, be allowed to plead absence of receipt as a ground of non-liability.

The view which we submit has been approved by the Calcutta High Court in *Jalim Singh Kotary v. Secretary of State for India*⁽¹⁾, and *Velayat Hossein v. Bengal and North-Western Railway Co.*⁽²⁾. The only point decided in *Banna Mal v. The Secretary of State*

⁽¹⁾ (1904) 31 Cal. 951.

⁽²⁾ (1909) 36 Cal. 819.

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for *India in Council*⁽¹⁾ was that the rule was not inequitable.

Binning, instructed by *Little & Co.*, for the opponents :—There is no contract with the Railway Company in absence of a receipt. The goods were lying in the goods-shed at the risk of the plaintiffs. The goods were not weighed and marked. They were not ‘delivered’ to us within the meaning of section 72 of the Indian Railways Act, 1890. If section 47 of the Act empowers the Railway Company to make rules, rule 2 is one of the rules so made. It has been sanctioned by the Governor General; it is, therefore, a valid and binding rule. Further, the liability of the Railway Company under section 72 is “subject to the other provisions of the Act”.

We rely on *Banna Mal v. The Secretary of State for India in Council*⁽¹⁾ and *Slim v. The Great Northern Railway Co.*⁽²⁾.

Jinnah, in reply.

C. A. V.

HEATON, J. :—This is a case in which the plaintiffs have claimed damages from the Great Indian Peninsula Railway Company on account of certain goods which were destroyed after they had been placed on the Railway Company’s premises and which the plaintiffs allege in effect had been delivered to the Company for the purpose of carriage by railway. The suit was disposed of by a Judge of the Court of Small Causes at Bombay in favour of the defendant, and after a hearing before the Full Bench the same conclusion was reached.

An application was made to this Court by the plaintiffs, a rule was issued and we have heard the matter fully argued. As neither the applicants nor the opponent

⁽¹⁾ (1901) 23 All. 367.

⁽²⁾ (1854) 14 C. B. 647.

have any objection to our disposing of this matter, I do not propose to say anything on the question of our jurisdiction except that so far as I am enabled to form an opinion in the absence of arguments, I do not see any serious reason to doubt that we have jurisdiction.

Section 72 so far as it covers this case runs as follows :—

“The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 152 and 161 of the Indian Contract Act, 1872.”

A “delivery to be carried by railway” means something more than a mere depositing of goods on the railway premises : it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case ; but it certainly may be completed before a railway receipt is granted. For by the instructions of the G. I. P. Railway “a railway receipt would not be granted until the consignment has been loaded.” The loading, it seems to me, would indubitably finish the delivery. As to whether the delivery would be complete at some earlier stage, for example, by the weighment, I say nothing, for the Court below has held that a receipt is essential and that is the only matter we are called on to decide. But it is argued that section 72 alone does not control the case, that the meaning of the section is modified by a rule made under section 47. This rule runs :

“Goods will in all cases be at owner’s risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant.”

If that rule is good then the decision of the Court below is correct. Is it good ? I think not. Its effect is to define and by defining change what otherwise would be the meaning of section 72.

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The provision to make rules which we are concerned with is contained in section 47 and is as follows :—

47 (f)—“ Every railway company shall make general rules consistent with this Act for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner.”

This gives no express power to make rules regarding the liability of the Railway and that liability it seems to me remains precisely as defined by section 72. To hold otherwise would be to assume that the legislature conferred, not expressly but indirectly or by implication, a power to modify by rule the natural meaning of a section of the Act. I think this cannot be so, firstly because it is a manner of making laws that I cannot attribute to a responsible Legislature: and secondly because I think it is directly against the provision that the rules must be consistent with the Act.

I would, therefore, make the rule absolute, set aside the decree of the lower Court and remand the suit to be disposed of with reference to the observations contained in our judgments in this matter.

Costs of this rule will be costs in the suit.

SHAH, J. :—The point argued in this case is whether rule No. 2 under section 47, sub-section (1), clause (f), is consistent with the provisions of section 72 of the Indian Railways Act or not, in so far as it makes the responsibility of the railway administration dependent upon a receipt being granted in the prescribed form.

The learned Judges of the Full Court have held that it is consistent with section 72 of the Act. Their decision proceeds upon the assumption that the goods were marked and weighed after the consignment note was tendered to the Company by the plaintiffs' agent.

I have considered whether a point of this kind could be appropriately decided in the exercise of the extra-

ordinary jurisdiction of this Court. Having regard to the importance and nature of the point, as also to the fact that both the parties are willing that it should be decided, I think it is a fit case for our interference, if not under section 115 of the Code of Civil Procedure, under the powers of superintendence which this Court has over the Presidency Small Causes Courts in virtue of section 6 of Act XV of 1882 and of the provisions of 24 and 25 Victoria, Chapter 104.

The goods in this case are said to have been brought on the railway premises and a consignment note given to the Company by the plaintiffs' agent. The parties are not agreed as to whether the goods were marked and weighed, and there is no finding of the Full Court on the point. It is common ground that no receipt was given by the Company. It is urged on behalf of the applicants that the Company is responsible for the loss or destruction of the goods delivered to the Company to be carried by railway as a bailee under sections 151, 152, and 161 of the Indian Contract Act—subject of course to the other provisions of the Indian Railways Act under section 72 of the Act. Apart from the rule in question it is not seriously disputed—and in my opinion cannot be disputed—by the Company that there may be delivery of goods to be carried by railway within the meaning of section 72 before any receipt is issued by the Company. The delivery contemplated by section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of carrying the same by railway. Such acceptance may be expressed or implied in a variety of ways by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend

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upon the circumstances of each case and the usual course of business of the railway administration as to whether the goods can be said to be delivered to be carried by railway under section 72 of the Act.

This being my view of the meaning of the expression 'delivered to be carried by railway' used in section 72, the question is whether rule 2 limits or modifies it in any way, and if it does so, whether it can do so. In my opinion it does not and cannot do so. The rule provides that "goods will, in all cases, be at owner's risk until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant." This rule has been sanctioned by the Governor General in Council and promulgated under section 47, sub-section (1), clause (f), for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner. It relates to wharfage, and is one of the rules under the heading "on goods for despatch waiting to be consigned." The first rule relates in terms to goods brought to railway premises for despatch but not consigned, and to a period before the consignment note is received. If due regard is had to the context as well as to the purpose of the rule in question, it seems to me that it cannot be used as in any way affecting the Company's liability under section 72 of the Act. It is true that the wording of the rule is rather wide and lends itself to the construction that no liability of the Company can arise unless and until a receipt has been granted by an authorised railway servant. Assuming, however, that the rule can be used for that purpose, it is necessary to consider whether it is consistent with the Act. If apart from the rule the goods can be delivered to be carried so as to render a railway administration liable as a bailee under section 72 without

any receipt being granted, the rule, which postpones the liability until a receipt is granted, seems to me to be inconsistent with section 72. The liability defined by the Act cannot be thus modified by a rule, and the fact that the rule has received the sanction of the Governor General in Council cannot remove the inconsistency. The result of thus postponing the liability may be serious in some cases. If the rule be allowed to have the effect, which the Company contends in this case it has, the goods can practically remain in charge of the Company for an indefinite length of time without the owner having any control over them, and without the Company being in any way liable for their loss or destruction. It is a result which ought to be avoided as far as possible. The Act does not appear to me to contemplate any such result, and in my opinion it cannot be secured by the rule in question.

It is urged on behalf of the Company that the consequences of holding that there may be delivery of goods within the meaning of section 72 before a receipt has been granted would be anomalous in those cases where the owner ultimately agrees to limit the responsibility of the Company as provided in sub-section (2) of section 72 inasmuch as there may be the liability of the Company before a receipt is granted, while after it is granted it would cease because of the agreement limiting the responsibility. I do not think that there is any anomaly in this nor can I think that the possibility of such an agreement being entered into in any case is any ground for not giving effect to the view that the rule in question is not consistent with the terms of section 72. Mr. Binning has relied upon the decision of *Banna Mal v. The Secretary of State for India in Council*⁽¹⁾. Apparently the only ground urged and considered in that case was whether the rule, which was similar to

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the rule with which we are concerned in this case, was bad because it was inequitable. It does not appear to have been argued that the rule was inconsistent with the provisions of section 72 of the Act. I am, therefore, unable to accept that case as any guide in deciding the question which has been argued in the present case.

It follows, therefore, that the commencement of the liability of the Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted, and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (f).

For these reasons I concur in the order proposed by my learned brother.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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APPELLANTS, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(ORIGINAL DEFENDANT), RESPONDENT.*

GULAB CHHITU AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. THE
SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFEND-
ANT), RESPONDENT.*

Limitation Act (IX of 1908), schedule I, Article 14—Possession of land as owner for fifty years—User of land as graveyard and also as timber depôt—Order by Government for discontinuing the user as timber depôt—Order ultra vires—Land Revenue Code (Bombay Act V of 1879), sections 65, 66.†

* First appeals Nos. 267 and 270 of 1912.

† The sections run as follows :—

65. An occupant of land appropriated for purposes of agriculture is entitled by himself, his servants, tenants, agents or other legal representatives, to erect

The plaintiffs were in possession of the land in dispute as owners ever since 1860 and used a portion of it as a graveyard, and on another portion of it they built a shed which was used as a timber shop. In 1871, Government assessed the land and entered it in the Revenue Registers as "Government waste land." The plaintiffs paid no assessment on the land. In 1908, the District Deputy Collector passed an order directing the Mamlatdar to "cause the building and the wood to be removed forthwith from the said land." This order was finally confirmed by the Commissioner on the 24th April 1909.

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farm-buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land, or its more convenient occupation for the purposes aforesaid.

But, if any occupant wishes to appropriate his holding or any part thereof to any other purpose, the Collector's permission shall in the first place be applied for by the registered occupant.

The Collector on receipt of such application shall at once furnish the applicant with a written acknowledgment of its receipt, and after inquiry may either grant or refuse the same; but, if the applicant receive no answer within three months from the date of the said acknowledgment, the Collector's permission may be deemed to have been granted.

Unless the Collector shall in particular instances otherwise direct, no such application shall be recognized except it be made by the registered occupant.

When any such land is thus appropriated to any purpose unconnected with agriculture, it shall be lawful for the Collector, subject to the general orders of Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of section 48.

66. If any such land be so appropriated without the permission of the Collector being first obtained, or before the expiry of three months from the date of the aforesaid acknowledgment, the occupant and any tenant, or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so appropriated, and from the entire field or survey-number of which it may form a part, and the registered occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of section 48 for the period during which the said land has been so appropriated, such fine as the Collector may, subject to the general orders of Government, direct.

Any co-occupant or any tenant of any occupant or any other person holding under or through an occupant, who shall, without the registered occupant's consent, appropriate any such land to any such purpose, and thereby render the said registered occupant liable to the penalties aforesaid, shall be responsible to the said registered occupant in damages.

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The plaintiffs filed the present suits on the 2nd February 1910, to obtain a declaration that they were absolute owners of the land, to have set aside the order of 1909, and to get a permanent injunction restraining Government from disturbing the plaintiffs in their possession of the land. The lower Court dismissed the suits holding that the plaintiffs were not absolute owners but occupants only, and that the suits were barred under Article 14 of the first schedule to the Limitation Act, 1908. The plaintiffs having appealed :—

Held, that as the land in dispute was not used for the purpose of agriculture, neither section 65 nor section 66 of the Land Revenue Code (Bombay Act V of 1879) applied to the case, and the orders passed by the Revenue Authorities to evict the plaintiffs were *ultra vires*.

Held, further, that the suits were not barred by Article 14 of the Limitation Act (IX of 1908), inasmuch as it was not necessary for the plaintiffs to have the order set aside.

APPEALS from the decision of E. H. Waterfield, Acting District Judge of Broach.

Suits for declaration and injunction.

The plaintiffs in these suits owned a piece of land, of which they were in possession ever since the year 1860. A portion of the land was used by them as a private cemetery (*kabarastan*). On another portion of the land they built a shed which was used as a timber shop.

It appeared that in 1871 Government assessed the land at Rs. 3-8-0; and entered it in the Revenue Register as "Government waste land." The plaintiffs were never asked to pay any assessment for the land.

In 1903, one of the plaintiffs appeared before the Talati of Ankleshvar in the course of revenue inquiry and stated as follows :—

I, Gulab Chhitu, residing at Ankleshvar, being questioned this day, state that the land of Survey No. 538, measuring acre 0-32, is set apart for a graveyard. I am managing this graveyard. This land is leased to one Jamnadas, a resident of the said town. I do not remember his father's name. The rent has been fixed at Rs. 17. I have built a hut on it and the other one has been built by the said Jamnadas. The said Jamnadas uses the hut built by me. The amount of Rs. 17, the rent of the land, is to be utilized for the purposes of the Pir's grave (*dargha*) which stands on this land. In order to keep the Pir's grave in a good state of repairs, the land is leased out. The hut is a *kachha* hut. I am ready to pull it down, if Government have any objection.

The inquiry resulted in a letter from the District Deputy Collector to the Mamlatdar of Ankleshvar on the 12th February 1907, which ran as follows :—

It will appear on looking into our office E. No. 634, dated 19th March 1898, and Meherban Collector's letter No. E.-1274, dated 19—20th April 1898, copies whereof are attached hereto in the correspondence of (the year) 1898, that the said Survey number has been fixed as being for (the purposes of) cemetery and only for that reason the Commissioner has sanctioned that the same should be continued (to be held) unassessed as (for purpose of) cemetery, although the present owner thereof has no (such) right. It will, moreover, appear from the very same papers that it has been refused to treat these numbers as "Inam" and to apply the summary settlement thereto: *vide* Meherban Collector Saheb's English letter, paragraph 4. Likewise, it will appear from seeing the last sentence of the said paragraph that the land, having been fixed as being for (purposes of) a cemetery, the owners thereof have no right left to them to use the same in any other way whatever.

If, in this manner, a house be built on the cemetery land, and a wood dépôt be opened there or would be stored there, that cannot be allowed on any account whatever. Therefore, you will please cause the building and the wood to be removed forthwith from the said land. Further, you will be good enough to send the statement in respect of the income which has become receivable from the time the correspondence commenced.

In part (?) 'Chh' of your endorsement No. 755, dated 17th October 1905, in the above matter, you have expressed an opinion that the land should be entered against the name (? of the party). However, looking to the papers accompanying (marked) E. that too is not possible, and even if the name be entered, still the building cannot be allowed to stand without fine, etc., being taken.

The plaintiffs appealed unsuccessfully to the Collector against the order. It was confirmed by the Commissioner on the 24th April 1909.

In the meanwhile, on the 28th September 1908, the following notice was served upon the plaintiffs :—

Notice under section 202 of the Land Revenue Code to Gulab Chhиту and Ahmedkhan Mahmedkhan directing to remove huts, heaps of wood, etc., from Survey No. 538 measuring gunthas 32 assessed at Rs. 3-8-0 as the land has been assigned to graveyard and, consequently, they have no right to use it for purposes other than graveyard. If they will make default in carrying out the order within thirty days, actions will be taken under section 202, Land Revenue Code.

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On the 2nd February 1910, the plaintiffs filed the present suits against the Secretary of State for India in Council praying that "they should be declared absolute owners of the land, that the defendant's order should be set aside with an injunction not to disturb them in their rights of ownership."

The defendant contended *inter alia* that the suits were time-barred; that the land was never a building site, but was used as a burial ground managed by plaintiffs' ancestors, and that the orders of the Revenue Officers were quite legal and justified by the provisions of the Land Revenue Code.

The District Judge held that the orders passed by the Revenue Authorities were not illegal; that the plaintiffs were not absolute owners of the land but occupants only, and that the suits were barred under Article 14 of the Limitation Act.

The plaintiffs appealed to the High Court.

G. N. Thakor for the appellants.

S. S. Patkar, Government Pleader, for the respondent.

HEATON, J. :—In this matter the following facts are either admitted or established beyond any real controversy.

There is a certain plot of land which is used, and for many years has been used, as a graveyard, but also for storing wood. On the findings of the first Court which to this extent are not challenged in appeal, the occupants or persons who are in charge of the land whether with reference to its use as a graveyard or as a timber store are the plaintiffs. This occupation had continued for at least fifty years before this suit was brought.

Eventually the Government Officers decided that the plaintiffs should be evicted unless they ceased to use the land for the purpose of a wood store. I am describing the case in general, but I think in sufficiently

accurate, terms. Plaintiffs have brought this suit substantially to protect themselves against the proposed eviction by Government Officers unless they cease to use the land as a wood store. The Acting District Judge who heard this case substantially found the facts as I have described them, but he came to the conclusion that the order of eviction was perfectly legal and justified under the provisions of the Land Revenue Code. It is here at the outset where I differ from the District Judge. To begin with, as a general principle, Government have no power to evict persons in such occupation of land except as provided by the law, and it is not suggested that they have any power to evict these plaintiffs unless that power is to be found in the provisions of the Land Revenue Code. It is not denied that the plaintiffs are lawfully in occupation of this land provided that they put the land to a proper use, that is to say, they are not in occupation as trespassers or persons without any right. It is said, and it may be perfectly true, that they are in occupation as persons entitled to be in charge of the graveyard which exists on the land. But assuming this to be so, and knowing as we do, that they have used the land as a wood store, is there any provision in the Land Revenue Code which entitles the Government Officers to evict them? I can find none. It is not shown in this case that the land has been assigned for the purpose of a graveyard as provided in section 38 of the Land Revenue Code. We know merely that the land is and has been a graveyard for a very great many years. How, under what arrangement, or by whose authority, it came to be a graveyard we do not know, and in our ignorance it would be profitless to conjecture.

Then this land, so far as the evidence shows, has neither been assessed nor held for the purpose of agriculture. True, it was assessed, but so far as I can

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judge on the evidence it was assessed for some purpose not directly connected with agriculture, because when it was assessed, it had been for many years and was still a graveyard. No assessment was ever levied from the occupants and it nowhere appears from the Government records that the land was ever regarded as land to be used for the purpose of agriculture. In fact it never has been used for the purpose of agriculture, so far as the evidence informs us. It is not therefore land to which sections 65 and 66 of the Land Revenue Code apply. I can find no provision which entitles the Government to evict these persons as from their proceedings it seems they propose to do. On the merits, therefore, I feel no doubt whatever that the plaintiffs are entitled to protection against this intended eviction.

The only other points which I need notice are first that we are not in any way in this case concerned with the question as to whether Government have the power or whether they ought to levy any assessment on this land. Secondly, it has been argued that the suit is time-barred. It has been so argued because, it is said, Article 14 of the Schedule to the Limitation Act covers the case. That Article relates to a suit to set aside an act or order of an officer of Government. It is true that the suit is one in terms to set aside the order of an officer of Government but it is a suit to set aside an order which bears a date less than one year from the time when the suit was filed and, therefore, the suit is not on its face time-barred. What really underlies this argument is not a question of limitation so much as a very different question. It is argued that there was an earlier order and that limitation runs from the date of that order. That can only be if the order were one which, if not set aside, would lawfully operate as a bar to the plaintiffs' rights. So far as I can see, none of the

orders in the case operates as a bar to the plaintiffs' rights. Neither the earliest of them, that of the District Deputy Collector, nor the latest, that of the Commissioner. It is true that the orders are adverse to the interests of the plaintiffs and if practically given effect to, would lead to the eviction of the plaintiffs. No doubt these orders give the plaintiffs a right of action because they are at any rate to the extent of a threat, an invasion of their rights, but they are not a tangible invasion. They do not of themselves affect the plaintiffs, it would only be the enforcement of the orders which would do this. Therefore I think there is no bar of limitation in the case.

The order which I would propose is that the decree of the lower Court be set aside, that a declaration be made that the plaintiffs are in lawful occupation of the land in suit and are entitled to remain in such occupation undisturbed and I think the plaintiffs should have their costs in both the Courts.

SHAH, J.:—These appeals arise out of two suits brought by the respective plaintiffs against the Secretary of State for India in Council for a declaration that they were the owners of the property in suit and that they had been in possession and enjoyment adversely to the defendant for over sixty years, for the cancellation of a certain order of the Commissioner, Northern Division, and for a permanent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property. The lower Court dismissed the suits on the ground that the claim was time-barred, though it held that the plaintiffs were the occupants of the land in suit. The plaintiffs have appealed to this Court and have urged two points in support of the appeals, *viz.*, (1) that the evidence establishes the fact that they have been in possession of the property in suit in their own right, and (2) that their claim is not time-barred.

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With reference to the first point a few facts which are beyond dispute may be stated. The plaintiffs have been in possession of the land at least from the year 1860 and have been using the property partly as a graveyard and partly for the purpose of stacking timber. There is nothing to show as to how the plaintiffs obtained this land, nor is there anything to show that the defendant had originally assigned this land to them before the year 1860. In 1871 when a survey settlement was effected, the land was assessed. It is not clear on what footing it was assessed. It was entered in the Revenue register as waste land and the amount of assessment was shown in that register. No assessment was ever demanded from the plaintiffs up to the date of the present litigation. In 1898 there was some correspondence with regard to the land in suit as well as other lands and in the letter of the Collector to the Commissioner, dated the 20th of April 1898, the view which the Revenue Authorities took of their position with reference to this land is stated. It is not suggested, however, that the plaintiffs had anything to do with this correspondence or that any attempt was made to question the propriety of their possession or of the use which they were making of the land. In 1907 the order, which is referred to by the lower Court as the order which the plaintiffs must seek to set aside, was made by the District Deputy Collector. That was, however, only a letter addressed by that officer to the Mámlatdár of Ankleshvar, and there is nothing to show as to when, if at all, it was communicated to the plaintiffs. In that order it was stated as follows :—" If, in this manner, a house be built on the cemetery land, and a wood depôt be opened there or wood be stored there, that cannot be allowed on any account whatever. Therefore you will please cause the building and the wood to be removed forthwith from the said land." An

appeal was preferred against this order to the Collector, who declined to interfere. A further appeal was preferred to the Commissioner who made an order in April 1909 declining to interfere with the order of eviction. The notice which was actually served on the plaintiffs has been put in on behalf of the respondent now in this appeal. That notice orders the plaintiffs to remove the wood and clear the ground, directs them to use the land only for the purposes of a Kabarthan, and states that on failure of their doing so, steps would be taken against them under section 202 of the Land Revenue Code.

The present suits have been brought on the 2nd of February 1910, *i. e.*, within a year from the Commissioner's order, but more than a year after the order of 1907, Exhibit 49, or the notice of September 1908.

The plaintiffs have adduced evidence to show that at least since the year 1860 they have been using the land in suit in their own right and dealing with it as their own property. They have mortgaged and leased the property from time to time. There are superstructures over the land and it has been used as a timber shop. The evidence also shows that a part of the land is used as a private Kabarthan by the plaintiffs. It is not necessary to discuss the oral evidence which establishes these facts. The evidence as to the possession and the use of the property is clear and practically unchallenged. The lower Court also has substantially accepted that evidence as proving these facts. It is clear, therefore, that the plaintiffs have been in possession of this land for over fifty years. There is nothing to show that the defendant had assigned this land to them before that time. Under these circumstances it seems to me that though there is no direct evidence that the plaintiffs are the owners of the land, under section 110 of the Indian Evidence Act the burden

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of proving that they are not the owners would be on the defendant who affirms that they are not the owners.

Coming now to the defendant's evidence it seems to me that beyond the entries in the Revenue registers, there is nothing to show that the Government assigned this land to the plaintiffs. It is not shown under what circumstances this land came to be assessed in 1877, but it is significant that in spite of the plaintiffs using the land as their own, no attempt was made even after 1877 up to the year 1907 either to prevent them from using the land otherwise than as a Kabarasthan, and they were never asked to pay any assessment. I am unable to infer from these revenue records that this land was assigned to the plaintiffs by the defendant. There is only one other piece of evidence upon which the learned Government Pleader has relied for the purpose of showing that the plaintiffs are not the owners. That is the statement which was made by one of the plaintiffs on the 18th of September 1903 before the Taláti of Ankleshvar. There is no doubt that in this statement the deponent expresses his readiness to pull down the Kacha hut built on the land if Government have any objection to it. It seems to me, however, that no steps were taken after this statement, as I have already stated, up to the year 1907, and when steps were taken in 1907 or in 1908, the plaintiffs asserted their present claim. It does not appear clearly how the statement came to be made before the Taláti, but apparently it was in connection with some Revenue enquiry which ultimately resulted in the order of 1907. The plaintiff who has made this statement says that he made it in ignorance of law. On giving the best consideration to the statement it seems to me that it would not be right to treat this as an admission of the defendant's right by the plaintiffs. As soon as a definite

order was made in 1907 that the plaintiffs should remove the huts, which they had built on the land, they asserted their right as owners of the land. Under these circumstances I am unable to treat this statement as in any way advancing the defendant's case. In my opinion, therefore, the result of the evidence is that the plaintiffs' possession for over fifty years is established and that the defendant has failed to show that the plaintiffs are not the owners.

It is necessary to mention here that the Government have never attempted to levy the assessment from the plaintiffs. So far as the present dispute is concerned, it has arisen in consequence of the Revenue Authorities having asserted their right to evict the plaintiffs if they did not remove the huts and if they failed to confine the use of the land to the purposes of a Kabarasthan. It is not, therefore, necessary to consider whether even if the plaintiffs be the owners of this land the Government have the right to levy any assessment from them in respect of the land. In fact there are no materials in the case upon which this point could be decided, and it is clear that the Government have not so far called upon the plaintiffs to pay the assessment. In coming to the conclusion, therefore, that in virtue of the plaintiffs having proved their possession of the land in their own right and the defendant having failed to show that they are not the owners, we say nothing as to the right of the Government to assess this land and to levy the assessment from the plaintiffs. The lower Court has dealt with the question of assessment, but it does not seem to me to be either proper or necessary to decide that question in this case. I desire to make it clear that the declaration which may be made in favour of the plaintiffs in this litigation will be without prejudice to the right of the defendant, if any, to levy assessment in respect of this land.

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I now come to the question of limitation. The lower Court has held that under Article 14 of the Indian Limitation Act the suits are time-barred because they are brought more than a year after the order (Exhibit 49). It seems to me that the view taken by the lower Court on this point is wrong. In the first place in these suits it does not appear to me to be at all necessary for the plaintiffs to have any order set aside. Their claim is substantially one for confirmation of their possession and for an injunction restraining the defendant from evicting them. The order in question is not of such a character as would by itself have any effect if neither party took any action on it. Besides strictly speaking it is merely a communication by the District Deputy Collector to the Mamlatdar. In pursuance of this order no doubt subsequently a notice was issued, and it was urged, on behalf of the respondent, that at least from the date of that notice the suits ought to have been brought within a year. I do not think that that notice is any more an order within the meaning of Article 14 than the order which is supposed to have been contained in Exhibit 49. Further, on the merits, having regard to the view which I take of the plaintiffs' possession and of their right to this property, it is clear that the order in question is outside the powers of the Revenue Authorities. It was urged by the learned Government Pleader on behalf of the respondent that the order in question was justified by the provisions of sections 65 and 66 of the Land Revenue Code. It was contended that the plaintiffs having used the land for non-agricultural purposes, the Revenue Authorities had the power to evict the plaintiffs under section 66 of the Act: but in my opinion these provisions of the Land Revenue Code have no application to the present case as the plaintiffs are not occupants of the land within the meaning of the Code,

and their rights are not proved to be limited to the agricultural use of the land. It is not possible, therefore, to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue Authorities can be said to have the power to evict the present plaintiffs from the land in dispute. It follows, therefore, that the order and the notice are *ultra vires* of the Revenue Authorities. On these grounds it seems to me that it is not incumbent on the plaintiffs to have any order passed by the District Deputy Collector or the Collector or the Revenue Commissioner set aside.

I do not think that any injunction is necessary under the circumstances. It will be sufficient to declare that the plaintiffs are entitled to be confirmed in their possession of the land. I, therefore, concur in the order proposed by my learned colleague.

Decree set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

VASUDEO RAGHUNATH OKA (ORIGINAL PLAINTIFF), APPELLANT, v.
JANARDHAN SADASHIV APTE (ORIGINAL DEFENDANT), RESPONDENT.[©]

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Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—Transfer voidable at the option of the person defrauded—Purchaser at Court sale not a subsequent transferee—Person having interest in the property means person having interest at the date of the transfer.

The plaintiff purchased certain lands in 1906. In execution of a money-decree against the vendor, the lands were sold at a Court auction and purchased by the defendant in 1909, with full notice of the sale of 1906. The defendant having been put into possession of the lands, the plaintiff sued to recover possession relying on the sale of 1906. The defendant contended that the sale

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was not genuine and was not supported by consideration and was made with the object of defeating the creditors of the vendor. The trial Court negatived the contentions and decreed the plaintiff's claim. The lower appellate Court held that the sale of 1906 was bad under section 53 of the Transfer of Property Act, as the consideration was grossly inadequate, the sale was effected with the object of defeating and delaying the creditors of the vendor, and the plaintiff participated in the fraud. The plaintiff having appealed :—

Held, that the sale of 1906 could not be avoided, under section 53 of the Transfer of Property Act (IV of 1882), at the option of the defendant, who was not a creditor of the vendor, or a subsequent transferee or a person having an interest in the property, within the meaning of the section.

Having regard to the preamble as well as section 5 of the Transfer of Property Act (IV of 1882), a person who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53 of the Act.

A person having an interest in the property within the meaning of section 53 means the person who has such interest at the time of the transfer objected to.

SECOND appeal from the decision of K. H. Kirkire, First Class Subordinate Judge, Appellate Power, at Ratnagiri, reversing the decree passed by J. A. Samant, Subordinate Judge at Chiplun.

Suit to recover possession of land.

The land in dispute belonged originally to one Purshottam. He sold it to the plaintiff on the 19th February 1906 by a sale-deed Exhibit 14.

A money-decree was passed, in suit No. 257 of 1903, against Purshottam at the suit of Gopal Mahadev Gadgil. In execution of the decree, the land in dispute was sold at a Court auction and purchased by the defendant on the 22nd January 1909. The defendant purchased with full notice of the sale of 1906. The possession of the land was given to the defendant on the 19th September 1909.

The plaintiff filed the present suit to recover possession of the land from the defendant, relying on his sale-deed of 1906.

The defendant contended *inter alia* that the sale-deed of 1906 was hollow and passed without consideration for the purpose of defeating and delaying the creditors of Purshottam ; and that the plaintiff had fraudulently and collusively joined in the sale.

The Subordinate Judge held that the sale-deed of 1906 was not passed with intent to defeat or delay the creditors of Purshottam ; and that it represented a *bona fide* transaction. He, therefore, decreed the plaintiff's claim.

This decree was, on appeal, reversed. The lower appellate Court found that out of the consideration of Rs. 1,200 for the sale-deed of 1906 only Rs. 500 had been paid ; that the transfer was therefore for a 'grossly inadequate consideration within the meaning of section 53 of the Transfer of Property Act' ; that the effect of the transfer was to defeat and delay the creditors of Purshottam ; and that the plaintiff had actively participated in the fraud which Purshottam was practising upon the other creditors.

The plaintiff appealed to the High Court.

H. C. Coyaji, with *N. V. Gokhale* and *D. G. Dalvi*, for the appellant.

Dewan Bahadur G. S. Rao and *P. B. Shingne*, for the respondent.

SHAH, J. :—The question in this second appeal is whether the sale-deed of the 19th February 1906, under which the plaintiff claims, is voidable under section 53 of the Transfer of Property Act at the instance of the defendant, who is an auction-purchaser of the right, title and interest of the plaintiff's vendors in the *takshim*, with which we are concerned in this suit.

There is no dispute about the fact that the defendant purchased the right, title and interest of the heirs of

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the original owner Purshottam Oke in the *takshim* on the 22nd January 1909 in execution of a money-decree against the said Purshottam by one Gopal Mahadev Gadgil with full notice of the sale-deed in favour of the plaintiff. There was another similar sale-deed of the same date in favour of one Deodhar. But the claim on that sale-deed between Deodhar and the defendant has been compromised. It is common ground now that the plaintiff must succeed in this suit, if his sale-deed is good and operative. The objection taken by the defendant in the trial Court was that it was not a real transaction but entered into without consideration and with the fraudulent object of defeating the creditors of the vendors, whose right, title and interest he had purchased. The trial Court found that the transaction was real, and that there was consideration for it, and that it was not entered into with the object of defeating or delaying the vendor's creditors. On these findings the plaintiff's claim was decreed by that Court. In appeal, however, the learned First Class Subordinate Judge with Appellate Powers came to the conclusion that though a part of the consideration was proved it was grossly inadequate, that the sale was effected with the object of defeating or delaying Purshottam's creditors and that the plaintiff was aware of and participated in the fraudulent intentions of the vendors and was not a transferee in good faith. Apparently it was not contended that apart from the objection under section 53 of the Transfer of Property Act the transaction was sham and not real. The issues raised in both the Courts covered the controversy between the parties relating to section 53 of the Transfer of Property Act, and did not indicate that the defendant really contended that the transaction was not real but a mere cloak for concealing the true ownership which remained with the vendors. The lower appellate Court accordingly

reversed the decision of the trial Court and dismissed the plaintiff's claim.

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In the appeal before us Mr. Coyaji has argued on behalf of the appellant that section 53 of the Transfer of Property Act cannot help the defendant, as he is not a person, at whose option the deed is voidable under the section. He concedes that it is quite open to the defendant to raise the plea that the transaction is sham and colourable or that it is voidable under section 53 of the Transfer of Property Act. As regards the former contention, he says that though it was raised in the written statement, no issue was framed on the point, and that in any event after the finding of the trial Court, it was practically given up. This position has not been seriously contested by Mr. Rao on behalf of the defendant. In my opinion, therefore, it must be assumed for the purposes of this case that whatever infirmity there may be in the transaction in virtue of the provisions of section 53, it was not a sham but a real transaction between the vendors and the plaintiff. The findings recorded by the lower appellate Court on the issues arising under section 53 do not negative this assumption, and on the pleadings it would not be possible to say that the question was specifically raised or that it was urged before the lower appellate Court.

The appellant, therefore, relies upon the wording of section 53 of the Transfer of Property Act, and argues that the transaction is not voidable at the instance of the defendant, even though the findings of the lower appellate Court that the object of the sale was to defeat the creditors of the original owner and that the plaintiff was not a transferee in good faith be accepted. It is quite clear that the defendant is not the person, to defraud, defeat or delay whose claim this sale-deed could have been executed. The only persons whose

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claims were intended to be defeated were Purshottam's creditors as suggested in the lower Courts. It is quite clear that the defendant is not a creditor and that he does not seek to avoid the document for the benefit of any creditors. It was suggested, however, that the defendant would be a subsequent transferee or a person having an interest in the property within the meaning of section 53, paragraph 1. But the defendant is an auction-purchaser at a Court sale, and not a transferee by any act of the original owner. Having regard to the preamble as well as section 5 of the Act, it seems to be clear that a person, who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53. He is clearly not a person having an interest in the property within the meaning of the section, which apparently refers to interest, which exists in fact at the time of the transfer objected to. It is clear, therefore, that the deed is not voidable at the option of the defendant.

It remains to notice the argument of Mr. Rao that apart from section 53, when it was proved that the plaintiff was not a transferee in good faith, and that he had participated in the fraudulent intentions of the transferor, no Court ought to help the plaintiff. The argument, in order to be effective, must amount to this that the sale-deed was not real and that the vendors really continued to be the owners. I have already dealt with this aspect of the case, and in my opinion there is a real and substantial difference between a sham transaction and a transaction, which is voidable under section 53 in consequence of fraud at the instance of the person defrauded. It is difficult to understand how the defendant can succeed unless he is a person defrauded or the transaction is merely sham and colourable. As he is not a person at whose option the deed could be

avoided and as the deed is not a sham transaction, I do not see how the mere finding that the plaintiff is not a transferee in good faith can help the defendant.

I would, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the defendant.

HEATON, J. :—I agree.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Davar.

R. D. SETHNA (APPELLANT AND PLAINTIFF) v. JWALAPRASAD GAYAPRASAD, A FIRM (RESPONDENTS AND DEFENDANTS).^{*}

Shah Jog Hundi—Payment to the Shah—Fraudulent Hundi—Duty of Shah to trace the drawer—Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants—In case of fraud, notice, when to be given—Laches.

On the 10th June 1912 the defendants presented to the plaintiff for payment a hundi for Rs. 3,000 purporting to be drawn by one R in favour of M on the plaintiff payable at sight to a *Shah*. The plaintiff having had no advice regarding the said hundi refused to pay the said sum of Rs. 3,000. On the next day the plaintiff received a letter purporting to be written by R from Harpalpur, enclosing a railway receipt for 300 bags of linseed, stated to have been consigned by R from Ranipur Station, and asking the plaintiff to sell the goods and in the meantime to accept and pay on presentment two hundis, each for Rs. 3,000, drawn by R in favour of M on the plaintiff, payable at sight to a *Shah*. The same day the plaintiff handed over the said railway receipt to one K and received payment of Rs. 5,600. The plaintiff thereupon paid Rs. 3,000 together with one day's interest to the defendants in respect of the hundi which had been presented by the defendants to the plaintiff on the

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previous day as aforesaid and which was one of the hundis mentioned in the letter. The goods referred to in the railway receipt never arrived and K returned the said receipt to the plaintiff and was repaid the sum of Rs. 5,600. On inquiries being instituted it was found that no such person as R existed and that the hundi and the railway receipt were forged. The plaintiff sued to recover the money from the defendants relying on the custom prevailing among Marwari Merchants that the Shah who obtained payment of a Shah Jog hundi was, in the event of the hundi turning out to be a false, fraudulent, stolen, or forged hundi, bound to refund the amount of the hundi with interest unless he "traced it to its source," *i.e.*, produced the actual drawer or the person who committed the fraud.

Held, (1) that the defendants had been paid not as Shah but as indorsee for collection of a hundi purporting to be drawn against the security of a railway receipt.

(2) Assuming that there might be a liability imposed on the defendants by reason of the payment, to refund or to trace the hundi to its source, this would only be the case provided notice was given within reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund.

(3) That the hundi had been "traced to its source" within the meaning of the Marwari Association Rules before the defendants received information of the fraud.

THIS suit was filed by one Bansidhar Lachmi-narayan, who subsequently became an insolvent and was represented by the Official Assignee, against the firms of Jwalaprasad Gayaprasad and Munalal Gayaprasad to recover the sum of Rs. 3,000 with interest from the 10th June 1912.

The facts of the case were as follows:—On the 10th June 1912 the first defendants presented to the plaintiff for payment a hundi for Rs. 3,000 dated Jeth Sud 15th, 1969. The said hundi purported to have been drawn by one Ramlal Ramprasad on the plaintiff in favour of the 2nd defendants, and was payable at sight to a Shah. As the plaintiff had received no advice with regard to the said hundi he refused to pay it. On the next day however he received a letter purporting to come from

one Ramlal Ramprasad from Harpalpur in Alipore State. In the said letter was enclosed what purported to be a railway receipt for 300 bags of linseed which were stated to have been consigned by Ramlal from Ranipur Station on the G. I. P. Railway to the plaintiff's address in Bombay, and the plaintiff was requested to sell the goods and in the meantime to accept and pay two hundies for Rs. 3,000 each which Ramlal had drawn on the plaintiff in favour of the 2nd defendants. The plaintiff accordingly delivered the railway receipt in performance of a contract to one Killachand Devchand and was paid by the latter Rs. 5,600. Thereupon the plaintiff paid the 1st defendants the amount of the hundi which had been presented to him on the previous day, *viz.*, Rs. 3,000, together with one day's interest and the hundi was endorsed as paid. The plaintiff likewise paid monies in respect of a second hundi which was presented to him by one Gopaldas Vallabdas and which like the first mentioned hundi was a Shah Jog hundi dated Jeth Sud 15th, 1969, and purported to be drawn by Ramlal on the plaintiff in favour of the 2nd defendant firm. The plaintiff, however, did not make any claim in this suit with respect to this second hundi.

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Killachand Devchand was unable to obtain delivery of the goods covered by the railway receipt above-mentioned from the Railway Company and accordingly on the 6th August 1912 returned the railway receipt to the plaintiff, who repaid the sum of Rs. 5,600. Meanwhile inquiries were instituted with regard to the railway receipt and it was discovered that no such person as Ramlal Ramprasad, by whom the hundis purported to be drawn, ever existed and it was suspected that the hundies and railway receipt had been fabricated by one Kamlaprasad Munlal, the Station Master of Harpalpur. Kamlaprasad himself disappeared.

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The plaintiff, in support of his claim, contended that according to a well established custom amongst Shroffs relating to Shah Jog hundis the Shah who obtains payment of a Shah Jog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi, bound to refund the amount of the hundi with interest unless he produces the actual drawer or the person who committed the fraud.

The 1st defendants in their written statement denied that the amount of the hundi in question was paid by the plaintiff to them as Shah or that there was such a custom amongst Marwari Shroffs with regard to Shah Jog hundis as was alleged by the plaintiff. They also declared that the fraud alleged by the plaintiff was of such a nature that the plaintiff would not have been deceived by the same if he had exercised due care and vigilance and had instituted proper enquiries, and they further submitted that the plaintiff had been guilty of laches in discovering and communicating to them the alleged fraud and that he was consequently not entitled to recover anything from them.

The plaintiff was unable to effect service of the summons on the 2nd defendants and they were, at the first hearing of the suit, struck out.

The plaintiff's claim was first tried before Mr. Justice Macleod who held that the plaintiff had proved so far as was possible for him to do so, that the hundi had been forged. He also referred to *Davlatram Shriram v. Bulakidas Khemchand*⁽¹⁾ and held that the custom which the plaintiff alleged was well established, but he dismissed the suit on the ground that the plaintiff was guilty of laches in not having immediately informed the 1st defendants as soon as he discovered the fraud, that he

(1) (1869) 6 Bom. H. C. R. 24 (O. C. J.).

intended to claim a refund. The learned Judge found that Parshottam Raghawji, the plaintiff's gumasta, must have ascertained by the 10th or 11th August 1912 that the hundi was a forgery, but that no demand was made of the 1st defendants until the 25th September, equivalent to a delay of just over a month.

The plaintiff appealed.

Setalvad with *Desai* for the plaintiff and appellant.

Kanga with *Vakil* for the defendants and respondents.

SCOTT, C. J. :—This is an appeal from a decree of Mr. Justice Macleod dismissing the suit.

The suit was filed by Bansidhar Lachminarayan now an insolvent and represented by the Official Assignee to recover from the defendants Rs. 3,000 with interest from the 10th June 1912 upon a plaint containing the following allegations :—

On the 10th of June 1912, the plaintiff received a letter addressed to his firm in Bombay purporting to be from one Ramlal Ramprasad of Harpalpur in Alipur State in the Bundelkhand Agency. The letter enclosed what purported to be a railway receipt for 300 bags of linseed, stated to have been consigned by Ramlal from Ranipur station, and the plaintiff was asked to sell the goods and meantime to accept and pay on presentment two hundies for Rs. 3,000 each, dated the 15th Jeth Sud 1969, drawn by Ramlal in favour of the second defendant firm of Munlal Gayaprasad. On the same day one of the hundies, being a Shah Jog hundi drawn on the plaintiff by Ramlal in favour of Munlal, was presented by the first defendant and on the same day the other hundi mentioned in the letter was presented by Gopal-das Vallabdas.

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The first defendant's firm being respectable Shroffs and fulfilling the qualifications of a Shah, the plaintiff paid them the amount of the hundi on their responsibility according to the well-established custom in regard to Shah Jog hundis. The plaintiff delivered the railway receipt to one Kilachand in fulfilment of a contract for sale of linseed and received from Kilachand Rs. 5,600. As the goods mentioned in the railway receipt never arrived, the plaintiff in August took back the railway receipt and refunded the amount paid by Kilachand. He was informed by the Railway Company on the 22nd of August that the railway receipt appeared to be a fabrication. The plaintiff also began inquiries on his own account from which he had reason to believe that the second defendant firm belonged to Kamalaprasad Munlal, the Station Master of Harpalpur, that no such person or firm as Ramlal Ramprasad by whom the hundis purported to be drawn ever existed and that the hundis and the railway receipt were fabricated by the said Kamalaprasad Munlal or by some one at his instigation or in collusion with him for the purpose of defrauding the plaintiff. The plaintiff says that in accordance with the well-established custom among Shroffs and according to the rules of the Marwari Panch Shroff Association in respect of hundis the Shah who obtains payment of a Shah Jog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi, bound to refund the amount of the hundi with interest unless he produces the actual drawer or the person who committed the fraud.

It was proved at the hearing that the above statement of facts as appearing in the plaint was not correct in that the hundi was presented for payment to the plaintiff on the 10th June by the first defendant and payment was then refused and was only made on the 11th after the arrival that day of the railway receipt and

after the payment by Kilachand of Rs. 5,600 being ninety per cent. of the price of the linseed supposed to be represented by the railway receipt. It was also proved that the Marwari custom referred to in the plaint as declared in the rules of the Marwari Association is that "In case of a hundi coming in any fraudulent way, if the party receiving the amount of the hundi receives it as a Shah he is absolved from liability if he traces the hundi to its source. But if he does not do so he must repay the amount of the hundi with interest."

According to the statement in the plaint the fraudulent way here referred to covers, not only the case of a forged, but also of a stolen or lost genuine hundi. To the same effect is the plaintiff's deposition. The first issue raised was whether the hundi in question was paid on the responsibility of the first defendant as a Shah and in accordance with the custom alleged.

The plaintiff with reference to this issue deposed that he did not know the writer Ramlal or the firm of Munalal Gayaprasad and if he had not got the railway receipt he would not have paid the hundi. He only paid on the hundi and another hundi presented by another firm of Shroffs up to ninety per cent. of the value of the goods. He paid the defendant's hundi in full and the other in part. He received Rs. 5,600 for the railway receipt from Kilachand before he paid the defendants. The learned Judge, however, disposed of the first issue by saying "the Shah does not guarantee the solvency of the drawer, he guarantees the genuineness of the hundi. A drawee will not pay a hundi unless he has funds in his hands belonging to the drawer, or is willing to give him credit. And he will not pay on presentation of a Shah Jog hundi to a Shah unless he is satisfied as to the respectability of the Shah as he looks to him in case of anything afterwards going

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wrong with the hundis : see *Darlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. Therefore the issue is somewhat meaningless." We are unable to accept this view which was also pressed upon us by the appellant's counsel. In the case decided by Sir Joseph Arnould it was common ground that if payment were made to a Shah, as such, on a hundi which afterwards turned out to be stolen or lost, the drawee, who has paid, is entitled to a refund from the Shah to whom it has been mistakenly paid (unless he otherwise discharges himself in the customary way). Sir Joseph Arnould says at p. 29: "It seems to me that this evidence strongly tends to show that the drawee of the *hundi*, in accepting and paying it looks very mainly to the *Shah* as responsible in case of anything afterwards going wrong with the *hundi*; and that he relies on the solvency and respectability of the *Shah* as one of the principal grounds in inducing him to make payment without further inquiry."

But in the case of a lost or stolen hundi the hundi is *ex hypothesi* genuine: therefore the liability of a Shah who is paid does not rest on a guarantee of genuineness. The liability of a holder, who endorses a Bill of Exchange and passes it on under English law, is only that of a surety for the drawer and the acceptor but his position does not involve any liability to the acceptor.

We find it difficult to say what is the idea underlying the Marwari custom. It is perhaps this: that of two innocent parties the one nearest in the line of successive holders to the person who committed the fraud must find out the guilty party at the risk of otherwise having to recoup the innocent payer. In the present case, however, it appears to us that the first defendant was paid, not as a Shah, but as the indorsee for collection of

(1) (1869) 6 Bom. H. C. R. 24 at p. 29 (O. C. J.),

a hundi purporting to be drawn against the security of a document representing 300 tons of linseed, for payment was in fact refused until the railway receipt came to hand and had been sold for cash and no more was paid to the holders of the hundis than the exact amount realised on the railway receipt. This is a state of affairs not dealt with or contemplated in *Davlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. The rules of the Marwari Association which have been put in relate to cases where the party who receives the amount of the hundi receives it as a Shah. If the plaintiff simply paid on the security of the railway receipt he would have no equity to recover back the amount from the first defendant: see *Leather v. Simpson*⁽²⁾; and *Baxter v. Chapman*⁽³⁾.

Assuming, however, that there might be a liability imposed on the first defendant by reason of the payment to refund or to trace the hundi to its source, this would only be the case provided notice was given within a reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund: see *Davlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. The duty of the plaintiff cannot be put lower than this, although the Hindu law merchant may not be so strict as to notice of dishonour as the English law, as to which see *Megraj Jagannath v. Gokaldas Mathuradas*⁽⁴⁾. It is, however, quite clear that the plaintiff knew long before the end of August that the hundis and the forged railway receipt were part of a fraudulent scheme of kite flying perpetrated by Kamlaprasad, the Station Master of Harpalpur, the owner of the second defendant's firm, yet no notice was given till the

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(1) (1869) 6 Bom. H. C. R. 24 at p. 29 (O. C. J.)

(2) (1871) L. R. 11 Eq. 398.

(3) (1873) 29 L. T. 642.

(4) (1870) 7 Bom. H. C. R. 137 at p. 142 (O. C. J.)

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demand of refund on the 25th September to the first defendant who in his ignorance had continued to deal with and give credit in account to the second defendant firm up to the end of the Maru year. It was upon this ground that the lower Court dismissed the suit and we agree that it was a sufficient ground.

We are also of opinion that the hundi had been 'traced to its source,' within the meaning of the Marwari Association Rules before the first defendant received intimation of the fraud and that the second defendant's firm was in the circumstances "the person from whom the forged hundi was bought" within the contemplation of Sir Joseph Arnould's judgment. The learned Judge thinks not, because the second defendant only sent the hundi for collection to the first defendant, but as he gave credit in account for the proceeds he was in effect the buyer of the hundi : see *Mulchand Joharimal v. Suganchand Shivdas*.⁽¹⁾

If the first defendant was only the holder for collection of a hundi handed to him by the second defendant's firm who were the actual payee (and as it appears also the drawer) the second defendant's firm would be the proper defendants to proceed against : see *London and River Plate Bank v. Bank of Liverpool*.⁽²⁾

We affirm the decree and dismiss the appeal with costs throughout excluding, however, the costs of cross-objections other than that as to costs.

Attorneys for the appellant : *Messrs. Malvi, Hiralal, Mody & Co.*

Attorneys for the respondents : *Messrs. Ardeshir, Hormusji Dinshaw & Co.*

Appeal dismissed.

M. F. N.

⁽¹⁾ (1875) 1 Bom, 23.

⁽²⁾ [1896] 1 Q. B. 7 at p. 12.

CRIMINAL REVISION.

1915.

February 16.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR v. GULAM HYDER PUNJABI.*

Indian Penal Code (Act XLV of 1860), sections 337, 338—Hurt caused by rashness or negligence—Hakim—Performance of eye-operation with ordinary scissors—Neglect of ordinary precautions—Partial loss of eye-sight.

The accused, a Hakim, performed an operation with an ordinary pair of scissors, on the outer side of the upper lid of the complainant's right eye. The operation was needless and performed in a primitive way, the most ordinary precautions being entirely neglected. The wound was sutured with an ordinary thread. The result was that the complainant's eye-sight was permanently damaged to a certain extent. The accused was on these facts convicted of an offence punishable under section 338 of the Indian Penal Code. He having applied to the High Court:—

Held, that the accused had acted rashly and negligently so as to endanger human life or the personal safety of others.

Held, also, that the act of the accused amounted to an offence punishable under section 337 of the Indian Penal Code, since there was no permanent privation of the sight of either eye in consequence of the operation.

Where a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law.

THIS was an application from conviction and sentence passed by Chunilal H. Setalvad, Second Presidency Magistrate of Bombay.

The facts were as follows:—The accused was a Hakim professing to be a specialist in eye-diseases. The complainant was suffering from granulations in her right eye. She was taken by a friend of her husband to the accused, who examined her eyes and said he would charge Rs. 30 and cure her eyes within two hours.

* Criminal Application for Revision No. 430 of 1914.

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The accused then performed an operation on the upper lid of the complainant's right eye with an ordinary pair of scissors. The wound was sutured with an ordinary thread. The accused did not even take the precaution of sterilizing the instruments used in the operation. It appeared that "the operation was a needless one and performed in a primitive way." The result of the operation was that the complainant lost partially the sight of her right eye.

The accused was charged with causing grievous hurt to the complainant. His defence was that the operation was performed with the consent of the complainant; that it was properly performed according to the native methods; and that he was competent to perform it as he had already performed a large number of such operations.

The trying Magistrate found that the complainant did not consent to the operation; and that the accused did the act so rashly and negligently as to endanger the personal safety of the complainant. The accused was therefore convicted of an offence punishable under section 338 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 150, awarding the whole of the fine to the complainant by way of compensation.

The accused applied to the High Court.

P. N. Godinho, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, J.:—The applicant in this case has been convicted of causing grievous hurt by a rash and negligent act under section 338, Indian Penal Code.

It is urged on his behalf that his act was neither rash nor negligent as alleged by the prosecution, that he is

protected by section 88 of the Indian Penal Code, as the complainant consented to suffer the harm caused to her, and that the hurt caused is not proved to be grievous hurt. As regards the first contention, the facts which are either proved or admitted are these: The accused, who is a *Hakim*, performed an operation, on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. As the Magistrate correctly finds: the most ordinary precautions, such as, using proper instruments for the operation as well as for protecting the eye-ball, disinfecting and sterilizing the instruments and using antiseptics, were entirely neglected. The medical evidence shows that the operation was needless and performed in a primitive way. It is not shown that it was in accordance with any recognized Indian method. Dr. Prabhakar, who has been examined on behalf of the defence, says that he has not seen lid operations performed by Hakims, though he has seen cataract operations performed by them. On these facts, it was quite open to the learned Magistrate to find that the accused acted so rashly and negligently as to endanger human life or the personal safety of others. For where, as here, a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law. This case has been very fully argued before us; but we have heard nothing to induce us to think that the finding of the lower Court is not proper. The fact of the accused having treated a large number of cases and, according to him, successfully, was relied upon by Mr. Godinho. Quite apart from the infirmity of the evidence bearing

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on this point, which has been mentioned by the Magistrate, it appears that in many cases the diseases treated and the operations performed by the accused were quite different. And there is not a single case in which it is shewn that the disease and the circumstances connected with the operation were the same as in this case. This renders the evidence relating to these several cases practically useless, if not irrelevant. The point in the case is not whether the petitioner is at liberty to use such skill as he may possess in performing such operations, but whether, in doing so, he has acted rashly or negligently. It matters not, for this purpose, whether a practitioner is trained or not; he is bound by law to avoid such rashness or negligence as would endanger human life or the personal safety of others, if he undertakes an operation. In our opinion, the petitioner has been properly found to have acted rashly and negligently.

As regards the argument based on section 88 of the Indian Penal Code, it is rather difficult to accept the learned Magistrate's finding that the accused acted without the complainant's consent and against her wish. If he did so, he would be guilty of causing hurt, simple or grievous, whichever it may be, quite independently of the consideration whether he acted rashly or negligently. This apparently is not the prosecution case, and that is not the charge against him. The gravamen of the charge against him is that he acted rashly and negligently. On the evidence, what appears to have happened is this. When the complainant was taken to the accused the latter persuaded her to accept his treatment, and her companion, Sayad Hassanally, who had taken her to the accused and who apparently had faith in the skill of the accused as a *Hakim*, wanted her to submit to his treatment. The complainant had neither time nor opportunity to realise what it was that she

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was asked to submit to; but on the persuasion of both she submitted to the operation. In that sense she consented to the operation. But she hardly realised the harm or the risk of the harm, which the operation involved, and did not consent expressly or impliedly to the harm or the risk of the harm as required by section 88 of the Indian Penal Code. It is not suggested—certainly not proved—in this case that the complainant had anything like a real opportunity to realise the nature of the accused's act, and the harm and the risk incidental to that act, so as to be a consenting party to the operation, in whatever manner it might be performed. It is clear, therefore, that the accused is not protected by section 88 of the Indian Penal Code, even if we assume that the other conditions necessary to invite the application of that section are fulfilled.

Lastly, it is urged that the hurt caused is not proved to be grievous. The medical evidence on this point is that ~~as a result of the operation performed by the accused, complainant's eye-sight would be permanently damaged to a certain extent.~~ This is not sufficient to establish that there has been a permanent privation of the sight of either eye in consequence of the operation. It is not suggested in this case that the hurt is otherwise grievous as defined by section 320 of the Indian Penal Code. This contention appears to be good, and must be allowed.

As regards the sentence, having regard to all the circumstances a substantial fine would meet the justice of the case and no sentence of imprisonment is necessary.

The result, therefore, is that the conviction under section 338 is set aside and the petitioner is convicted of causing hurt under section 337, Indian Penal Code. The sentence of imprisonment is set aside and that of

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fine confirmed. The order as to compensation must, of course, stand.

Conviction and sentence altered.

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APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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March 9.

DALPATSING-JI NAHARSING-JI (ORIGINAL PLAINTIFF) APPELLANT, v.
RAISING-JI NAHARSING-JI AND OTHERS (ORIGINAL DEFENDANTS 1 and 2)
RESPONDENTS.*

Hindu Law—Adoption—Effect of invalid adoption—Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration—Incomplete contract.

Under Hindu Law, a boy whose adoption has been found to be invalid has no right to be maintained out of the estate of the adopted family.

The plaintiff, claiming to be the adopted son of the late Thakor of Mehelol, applied to obtain certain lands from the estate by way of maintenance, to the Collector who was in charge of the estate. The Collector persuaded the present Thakor (defendant) to settle the matter. Accordingly, the defendant made a declaration in writing that he would give the Kankanpur *wanta* by way of maintenance to the plaintiff and his direct lineal heirs. The defendant did not execute any formal deed to convey the lands. The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration :—

Held, that the defendant was not bound by the declaration, which marked only a stage in the negotiations, which, unless completed, could be broken off at any time by either side.

FIRST appeal from the decision of C. N. Mehta, Joint Judge of Ahmedabad.

Suit to recover possession of lands, which belonged to the Mehelol estate in the Panch Mahals District.

* First Appeal No. 281 of 1912,

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The late Thakor of Mehelol, Naharsingji, died on the 27th November 1883, leaving him surviving two widows: Dariaba and Bajirajba. Later, Bajirajba gave birth to a son Raisingji (defendant); but Dariaba alleged that the child was spurious. Bajirajba brought a suit in the Ahmedabad Court to establish that Raisingji was the validly born son of Naharsingji. She succeeded in the suit. But the High Court decided on the 25th July 1892 that Raisingji was only a supposititious son.

On the 8th August 1892, Dariaba adopted Dalpat-singji (plaintiff) as son to her husband.

Bajirajba appealed to the Privy Council on the 17th November 1892; and she succeeded on the 3rd August 1898 in having the decision of the High Court reversed; and in establishing that Raisingji was the genuine son of Naharsingji.

In the meanwhile, the Collector was appointed guardian of the Mehelol estate, on the 10th August 1895.

On the 15th September 1909, the plaintiff applied to the Collector claiming "a fourth share in the estate or at least something equivalent thereto as would be sufficient for his maintenance." The Collector sought the advice of the Government Pleader, who was of opinion that "on the authorities quoted and the circumstances of the case there is very great force in it;" that "in justice, equity and good conscience, as well as according to law, the petitioner has a good cause," and that "he can claim an equivalent maintenance (*i.e.*, equivalent to his fourth share) from the income of the estate or lands in lieu thereof." Influenced by this advice, the Collector desired Raisingji to settle Dalpat-singji's claim. Accordingly on the 1st June 1910, Raisingji made the following declaration before the Assistant Collector under his signature:—

"I, Raisingji Naharsingji, Thakor of Mehelol, state that I have to give an *inam* to my adopted brother Dalpatsing and his direct male descendants for

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maintenance, *i.e.*, I have to give lands out of my *wantas*. I accordingly, voluntarily, give the Kankanpur *wanta* to him and his direct male descendants on whose extinction it will revert to me."

A formal agreement to convey the Kankanpur *wanta* to Dalpatsingji was to be later prepared and executed by Raisingji ; but the latter under one pretext or other evaded the execution of the deed.

Eventually, the plaintiff brought the present suit to recover lands in *Jivai* (maintenance) equal to one-fifth share in the properties belonging to the Mehelol estate as the adopted son of Naharsingji or in the alternative the lands known as the Kankanpur *wanta*.

The defendant Raisingji contended *inter alia* that the plaintiff's adoption was illegal and void ; that he was forced to give the Kabulayat dated 1st June 1910 under compulsion and fear of injury ; and that the Kabulayat was unenforceable in law and no claim could be based on it.

The trial Judge held that the adoption was invalid and gave no right to the plaintiff ; and that the Kabulayat was not enforceable, on the following grounds :—

The plaintiff's next contention is that even if he be held not entitled to a share in the estate, still he has a right to be maintained by the estate and sections 163 and 164 of Mayne's 4th edition (or sections 176—178 of 7th edition) are cited in support. But Mayne there also observes that the text of Manu enjoining the person adopting a son without observing the rules ordained to make him "a participator of the rites of marriage, not a sharer of wealth," *i.e.*, to maintain him, seems to be interpreted as applying to a person who makes an adoption without observing the proper forms, *i.e.*, in cases where the adoption is informal, not invalid *ab initio* ; and cites in support the rulings in *Bawani v. Ambabay* (1 Mad. H. C. 363), approved by Westropp, C. J., in *Lakshmappa v. Ramava* (12 Bom. H. C. 364, p. 397). And the reason of this rule has been stated to be that "where no valid adoption, in other words, no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law." The Court in those cases also expressed their opinion that the natural rights of the plaintiff remained quite unaffected.

But even in the above view of the *Kabulayat* it is only a contract for the transfer of the property and has not the effect of itself creating any interest in, or charge on, such property (*vide* the concluding portion, section 54 of the Transfer of Property Act, 1882). It may form the basis of a suit for specific performance of the contemplated deed of conveyance, but the present suit is not for that. And I am distinctly of opinion that I, as a Court of Equity, would be extremely reluctant to decree specific performance in such a suit, even supposing that the "compromise" was quite voluntary and free from undue influence.

The suit was therefore dismissed.

The plaintiff appealed.

H. C. Coyaji with *G. N. Thakor*, and *H. V. Divatia* (for *T. R. Desai*), for the appellant.

G. K. Parekh, *D. A. Khare*, and *U. K. Trivedi*, for respondent 1.

S. S. Patkar, Government Pleader, for respondent 2.

SHAH J.:—The facts which have given rise to this appeal are briefly these. Naharsingji, Thakor of Mehelol, died in the year 1883, leaving two widows Dariaba and Bajirajba. Bajirajba gave birth to a son named Raisingji, whose legitimacy was disputed by Dariaba. Bajirajba filed suit No. 967 of 1886 to establish that Raisingji was the natural son of Naharsingji. She succeeded in the suit, but in appeal the High Court reversed the decree of the trial Court and held that Raisingji was not the son of Naharsingji. There was an appeal, however, preferred by Bajirajba to Her Majesty in Council with the result that the decision of the High Court was reversed and that of the trial Court restored in 1898. The High Court decided the appeal on the 25th July 1892. A few days after that Dariaba adopted Dalpatsingji, the present plaintiff, on the 8th August 1892, before the application for leave to appeal to Her Majesty in Council was made on the 17th November 1892. The estate was managed by the Collector after 1895 as the guardian of Dalpatsingji, and after 1898 on

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behalf of Raisingji. Even after Raisingji attained majority the management of the estate remained with the Collector of the Panch Mahals under section 26 of the Gujarat Talukdars' Act (Bombay Act VI of 1888). The estate among other things consists of Talukdari estate and certain *wanta* lands. The Collector continued to give varying sums by way of maintenance to Dalpatsingji even after the judgment of the Privy Council. In September 1909, Dalpatsingji made an application to the Collector requesting him to bring about an amicable settlement between him and Raisingji. In this application he put forward his claim to a part of the estate as the adopted son of Naharsingji. In 1910 it is said that Raisingji agreed to give to Dalpatsingji certain land known as Kankanpur *wanta* by way of *jivai* (maintenance). But Raisingji failed to carry out this agreement, and Dalpatsingji filed the present suit to enforce his rights as Naharsingji's adopted son. He claimed one-fifth share in the estate and, in the alternative, the Kankanpur *wanta*, both according to law as well as under the agreement of 1st June 1910. The defendant Raisingji, who is the really contesting party, resisted the claim on various grounds. The learned Joint Judge, who heard the suit, decided against the plaintiff on the material issues, and dismissed his claim.

The plaintiff has now appealed to this Court. Mr. Coyaji on his behalf has argued two points only in support of the appeal. Firstly, it is contended that even if the plaintiff's adoption be invalid he has a right of maintenance on his adoptive family according to Hindu Law, and secondly, that under the agreement the plaintiff is entitled to the Kankanpur *wanta*. It is conceded by Mr. Coyaji—and I think very properly conceded—that after the finding of the Privy Council as to the status of Raisingji, the plaintiff's adoption by Dariaba cannot be maintained as valid. Naharsingji

having a natural son according to the finding of the Privy Council, at the date of adoption, Dariaba could not be presumed to have any authority from her husband to adopt. The fact that the adoption was made by her at a time when the High Court had decided in her favour and against Raisingji's status, and before an application for leave to appeal to Her Majesty in Council was made in November 1898, cannot affect the question. It is not necessary to deal with this point any further as it is not contended before us that the adoption of the plaintiff by Dariaba is valid according to Hindu Law.

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As regards the contention that a boy, whose adoption is found to be invalid, has a right to be maintained out of the estate of the adoptive family, there is neither text nor precedent in support of it. Dariaba had no authority to adopt. The mere fact that ceremonies were properly performed and that Dariaba thought that she had authority to adopt would not affect the question. As pointed out by Sir Michael Westropp C. J. in *Lakshmappa v. Ramava*⁽¹⁾ "An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated." The Madras High Court has taken the same view in *Bawani v. Ambabay*⁽²⁾ which is referred to with approval by Westropp C. J. in *Lakshmappa's case*. Mr. Coyaji relied upon certain observations in *Ayyavu v. Niladatchi*.⁽³⁾ But they were not necessary for the decision of the case. It is difficult on principle to allow the contention that even though the adoption may be invalid, the adoptee has a legal right to maintenance in the adoptive family. I say this strictly with reference to the facts of this case. There is no question of

(1) (1875) 12 Bom. H. C. R. 364 at p. 397. (2) (1863) 1 Mad. H. C. R. 363.

(3) (1862) 1 Mad. H. C. R. 45.

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acquiescence here on the part of Raisingji apart from the agreement of June 1910. The plaintiff is not proved to have lost his right in the family of his birth. It may be that in consequence of the Mehelol estate being far more valuable than the estate of his natural father he may have preferred to take his chance, whatever it may be, in the adoptive family. Mere omission on his part to assert his right to a share in the estate of his natural father cannot enhance his rights in the family of adoption. It is not necessary to consider whether the plaintiff would have any right of maintenance in his adoptive family, if it were proved that he had in fact lost his status in the family of his birth, though even then it would be difficult to accept the plaintiff's contention. I hold that having regard to the facts of the case, the plaintiff's adoption is invalid and that he has no legal rights in his adoptive family.

Coming to the argument based on the agreement, it is necessary to state a few facts relevant to the point. I have already mentioned the plaintiff's application to the Collector for an amicable settlement. The Collector consulted the Government Pleader of the District, who happened to know the case of Dalpatsingji. The Government Pleader advised that "in justice, equity and good conscience as well as according to law the petitioner (*i. e.*, Dalpatsingji) had a good cause." It is not unlikely that the Collector and the Assistant Collector were influenced by this opinion. Raisingji was persuaded to settle the matter. Accordingly he undertook on the 1st June 1910 in the presence of the Assistant Collector to give his Kankanpur *wanta* by way of maintenance to Dalpatsingji and his direct lineal heirs. It is not denied by the plaintiff, in fact it is his case, that a document conveying the *wanta* to him was to be executed and registered later on by Raisingji and that he (Raisingji) never appeared to

execute the document. It is the declaration or the statement made by Raisingji before the Assistant Collector that is relied upon by the plaintiff as an agreement to give him the Kankanpur *wanta*. There are various difficulties in accepting the said declaration as a final and binding agreement. In the first place it is clear that the declaration marks a stage in the negotiations as to the proposed amicable settlement. A document giving effect to the declaration, or statement was to be executed later on, though it is not mentioned in the declaration. Raisingji refused to execute it, and after giving an undertaking never expressed his willingness to carry it out. In form the document is not an agreement. It is neither stamped nor registered. If in effect it creates an interest in immoveable property, it must be registered. The plaintiff contends, however, that it is merely an agreement to convey, and does not by itself create any interest in his favour in the property and that it should be specifically enforced as embodying a fair settlement of the dispute between the parties. The whole conduct of the defendant Raisingji shows that he was ready at the time of the declaration to give the Kankanpur *wanta*, and that he changed his mind when it came to the stage of giving effect to the settlement. Apparently the plaintiff had given no correlative undertaking at the time, and I am unable to see anything in the case, which restricted his liberty in the eye of law to assert his claim to a fifth share in the estate as he has done in the present suit. Of course it may be that having regard to his own interests he may not in fact have cared to do so. But that is not the test. Having regard to these considerations it seems to me that it was quite open to the defendant Raisingji to change his mind. There was no completed contract. An undertaking of this kind marks only a stage in the negotiations, which, unless completed, may be broken off at any time by either side.

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Secondly, it is clearly an undertaking, which no Court would enforce against Raisingji. He was admittedly a man of weak intellect. His estate was managed by the Collector under section 26 of the Gujarat Talukdars' Act, probably because he was incapable of managing his own estate as stated by the witness (Exhibit 52). He would be under a disability to enter into any agreement with reference to any part of his property without the sanction of the Managing Officer under section 29 A of the Act. I do not desire to express any opinion on the question whether this agreement, even if otherwise good, is not invalid for want of the necessary sanction under section 29 A, as the point is not argued and as it is not quite necessary to come to any definite conclusion on the point. But these facts clearly render it necessary to examine closely the promise made by such a man. The promise made by him is practically without any consideration to support it. I am not sure that the defendant fully realised the effect of the expression referring to the direct lineal heirs of Dalpat-singji in the statement, which would apparently include daughters. It is a matter of common knowledge that persons in the position of the Thakor of Mehelol would be ordinarily unwilling to give *jivai* lands on terms, which would make it possible for the property to go out of the hands of the male members of the family. The *wanta* land was selected because, as stated by the Assistant Collector in his evidence, it was not possible to alienate Talukdar's estate under section 29 A of the Gujarat Talukdars' Act. It was hardly realised that the sanction under section 29 A would be necessary not only for the alienation of the Talukdar's estate but also for the alienation of *wanta* land (*i. e.*, for non-Talukdari estate). Even if the reason for selecting the *wanta* land was to avoid the necessity of a sanction of the Governor-in-Council under section 31 of the Act, which is held by this Court to relate to the Talukdars'

estate of a Talukdar and not to any property of the Talukdar held on non-Talukdari tenure, the result was that *wanta* land was to be given up by the defendant. It is obvious—and in fact it was not denied by Mr. Coyaji—that generally speaking the tenure of the *wanta* land would be more favourable to the holder than the Talukdari tenure. These are several considerations, which render it necessary in the interests of justice to hold that Raisingji is not bound by a promise of this character. I would certainly decline to specifically enforce an agreement of this kind, even if the suit were treated as being substantially one for the specific performance of the agreement.

Lastly, it may be stated that Mr. Coyaji has discussed the oral evidence relating to the so called agreement fairly and fully before us, and we have not found it necessary in this case to hear the counsel for the defendant Raisingji. It is clear that the Revenue Authorities acted fairly and honestly. They were persuaded by the Government Pleader to believe that Dalpatsingji had a good claim, and the Assistant Collector states that in bringing about this result he did use persuasion but no pressure. I do not think that the learned Judge below means to hold anything more than this, *viz.*, that a man of Raisingji's intellect, if persuaded by the Assistant Collector and Collector, is likely to yield even against his own real wishes, and that a consent given as the result of such persuasion should not be acted upon, if in fact it happens to be against the interests of the consenting party, and if he has retracted it almost immediately after giving it. This appears to be a fair inference from the evidence on the point; and as I have already stated the defendant cannot be bound by a bare promise of that character.

The result, therefore, is that the decree of the lower Court is affirmed with costs. Each respondent is to have a separate set of costs.

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HEATON, J.:—I wish to add only a few words in the matter of the conduct of the Revenue Officers which has been brought to our notice. I wish to say that in my opinion these Officers acted with perfect propriety. They obtained the legal opinion of their local advisers. They then endeavoured on the strength of that opinion to persuade this young Talukdar to make some provision for a very unfortunate man and in so doing it seems to me that they were acting very properly. But the document which this young Thakore signed, was, it seems to me, merely a written record of a declaration. It was not in its true sense an agreement at all. In so far as it had any formal character, it was merely a declaration made before the Collector. Obviously it was not intended to be a final declaration because a more formal deed was to follow.

I agree in the order proposed by my learned Colleague.

Decree affirmed.

R. R.

APPELLATE CIVIL.

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March 30.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

KESHAV HARGOVAN (ORIGINAL DEFENDANT), APPELLANT, v. BAI GANDI, MINOR, BY HER NEXT FRIEND, HER FATHER, PAKHALI MOTI KALA (ORIGINAL PLAINTIFF), RESPONDENT, AND KESHAV HARGOVAN (ORIGINAL PLAINTIFF), APPELLANT, v. BAI GANDI, MINOR, BY HER FATHER MOTI KALA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Dissolution of marriage—Custom of caste—Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognised by the Court—Indian Contract Act (IX of 1872), section 23.

A custom, stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the

*Second Appeals Nos. 1001 of 1913 and 80 of 1914.

divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court. It must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act (IX of 1872) and is equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession.

Reg. v. Karsan Goja and *Reg. v. Bai Rupa*⁽¹⁾ followed.

SECOND appeals against the decision of E. Clements, District Judge of Ahmedabad, confirming the decrees passed by Keshavlal V. Desai, Joint Subordinate Judge of Ahmedabad, in two suits Nos. 267 and 603 of 1912.

These were two cross suits, one (suit No. 603 of 1912) brought by the husband against his minor wife for restitution of conjugal rights and the other (suit No. 267 of 1912) by the wife against the husband for dissolution of marriage. The parties belonged to Pakhali caste which was divided into two factions. In the year 1899 plaintiff Keshav was married to defendant, Bai Gandhi, who was 15 years of age at the date of the suit No. 603 of 1912. Bai Gandhi had not lived with Keshav as he belonged to opposite faction. Keshav, therefore, sued her for restitution of conjugal rights. It was contended on her behalf that marriage in parties' caste was a simple contract subject to a condition sanctioned by custom; that it may be put an end to at the wish of the wife subject to a payment of money; that according to the resolution of the caste a husband was bound to divorce a wife on offer of Rs. 94 to caste Patel by the wife's side; that an amount of Rs. 28 out of this was to be paid to the husband; that the fixed amount of Rs. 94 was offered to the leaders of the faction to which defendant belonged; that the amount was not accepted.

Relying upon the caste custom and the resolution, Bai Gandhi by her next friend, her father, filed a suit (No. 267 of 1913) against her husband, Keshav, for dissolution of marriage. Therein defendant, Keshav, contended that

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⁽¹⁾ (1864) 2 Bom. H. C. R. 124.

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he did not admit the custom set up ; that the divorces were given in parties' caste if both the parties were willing and not otherwise ; that the Court could not entertain a suit of this nature.

The Subordinate Judge found that the custom in the caste of giving divorces was proved and that it could be acted upon according to law. He, therefore, allowed Bai Gandi's suit for dissolution and dismissed that of Keshav for restitution of conjugal rights.

Keshav filed two appeals Nos. 335 and 336 of 1913 to the District Court at Ahmedabad and in both the appeals the decrees of the Subordinate Court were confirmed.

Keshav, thereupon, preferred two second appeals to the High Court.

G. N. Thakor for the appellant (in both the appeals):—I contend that the custom alleged, even if held established, is one which the Courts will refuse to recognise. It is against public policy and against the spirit of Hindu Law. The lower Courts have misunderstood the effect of the various rulings referred to. These decisions leave no doubt that a custom such as is pleaded in this case cannot be recognised. I rely on *Reg. v. Karsan Goja* and *Reg. v. Bai Rupa*⁽¹⁾; *Uji v. Hathi Lahu*⁽²⁾; *Rahi v. Govinda*⁽³⁾; *Reg. v. Sambhu Raghu*⁽⁴⁾; *Narayan Bharthi v. Laving Bharthi*⁽⁵⁾.

The case of *Sankaralingam Chetti v. Subban Chetti*⁽⁶⁾ is quite different. It permits divorce only by *mutual agreement*. The Courts have gone the length of convicting persons marrying without having their prior marriage validly dissolved.

(1) (1864) 2 Bom. H. C. R. 124.

(4) (1876) 1 Bom. 347.

(2) (1870) 7 Bom. H. C. R. (A. C. J.) 133.

(5) (1877) 2 Bom. 140.

(3) (1875) 1 Bom. 97.

(6) (1894) 17 Mad. 479.

G. K. Parekh for the respondent (in both the appeals):—The cases cited do not establish that a custom by which a woman can get her divorce on payment according to caste usage is invalid. A remarriage without a divorce may be invalid, but no case expressly says that such a divorce if permitted by usage cannot be granted. In the present case there being a custom compelling a divorce such a divorce should be allowed on the strength of the custom proved: see *Sankaralingam Chetti v. Subban Chetti*⁽¹⁾; *Jukni v. Queen-Empress*⁽²⁾.

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SCOTT, C. J.:—These appeals are brought in two suits, the one being a suit for the restitution of conjugal rights, and the other a suit for dissolution of marriage. The plaintiff in the suit for restitution is the adult husband of the defendant, a minor, who has attained the age of puberty. The duty is imposed by Hindu Law upon the wife to reside with her husband: see *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*⁽³⁾. There is no evidence that he has been guilty of such conduct as would justify his wife in claiming the protection of the Court. The defence is that the defendant is no longer the plaintiff's wife and it is to obtain a declaration to that effect that the cross suit has been brought in her name. It is claimed that by virtue of a caste custom the minor wife can by the expression of her desire so to do accompanied by a payment of money, the greater part of which goes to the caste and a small portion to the unwilling husband, free herself from the marriage tie. Whether such a custom could be recognised by the Court in the case of an adult wife will be discussed later in this judgment. The plea in the wife's written statement is that the marriage is a contract subject to a condition sanctioned by custom, that it may be put an end to at the wish of

⁽¹⁾ (1894) 17 Mad. 479.⁽²⁾ (1892) 19 Cal. 627.⁽³⁾ (1901) 28 Cal. 751.

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the wife subject to a payment of money. We cannot accept the position that marriage among Hindus is only a contract, but even if it were so, it could only be a contract when concluded between adults capable of contracting. That is not the case here, and it is probable that the child wife who is put forward as paying money for the caste and for the repudiated husband is merely a pawn in a game between those who are the real instigators of her suit and the opposite party in the caste who dispute the existence of the alleged custom.

The parties are Hindus of the Pakhali caste. It appears that, factions having broken out in the caste, and the husband and his father-in-law taking different sides, the wife is anxious to divorce the husband. She claims to be entitled to do so by virtue of a caste-custom which authorises either spouse to divorce the other, against that other's will and with or without any assignable reason, on payment of a sum of money fixed by the caste from time to time. The lower Courts have passed a decree in the wife's favour, holding that the custom set up was proved, and that it is not opposed to public policy. Having regard to the recency of the caste resolutions purporting to affirm this custom, to the incompetence of the caste to pronounce marriages void, and to the recitals in various deeds to the effect that these *farkats* were executed with the consent of both spouses, we doubt very much whether the inference that the alleged custom is legally established can be supported by the evidence on the record. But we prefer to put our judgment on the broader ground that the alleged custom, assuming it to be proved, must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act. In our opinion this view is apparent from a consideration of the mere character of the custom set up, and it

is also to be supported by the decisions of this Court.

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The custom pleaded is, as we have said, a custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste. That sum admittedly is liable to alteration from time to time at the will of the caste: Rs. 55 today, it may be Rs. 5 tomorrow. We need only say that in our opinion it is impossible for the Court to recognise any such custom as this; it is opposed to public policy as it goes far to substitute promiscuity of intercourse for the marriage relation, and is, we think, equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession. The requirement of the payment of a sum of money, on which the learned District Judge relies, seems to us to be immaterial, and we can see no substantial distinction between the recognition of this custom and the declaration that the tie of marriage does not exist among Hindus of the Pakhali caste.

As to the cases, it was laid down as early as 1876 in *Reg. v. Sambhu Raghu*⁽¹⁾ that "the Court does not recognise the authority of the caste to declare a marriage void, or to give permission to a woman to remarry." It is true that this ruling was not followed in *Jukni v. Queen-Empress*⁽²⁾, but there the learned Judges found that the husband had relinquished his wife, so that this decision is of no authority on the present facts. In *Reg. v. Karsan Goja* and *Reg. v. Bai Rupa*⁽³⁾, which were criminal cases, the question was whether a woman of

⁽¹⁾ (1876) 1 Bom. 347.

⁽²⁾ (1892) 19 Cal. 627.

⁽³⁾ (1864) 2 Bom. H. C. R. 124.

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the Talapda Koli caste was punishable under section 494, Indian Penal Code, or whether she could successfully plead a caste-custom under which a married woman was permitted to leave her husband and contract a second marriage without the husband's consent; and the Court said that "such a caste-custom, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu Law." That decision was given in 1864, and, so far as we are aware, has never since been doubted. It is, we think, direct authority in favour of the view that the custom which is set up in the present appeal, and which in essentials is indistinguishable from that pleaded in the case of 1864, cannot be recognised by the Court. The decision in *Reg. v. Karsan Goja* and *Reg. v. Bai Rupa*⁽¹⁾ was approved and followed by Sir M. Westropp C. J. and Melvill J. in *Narayan Bharthi v. Laving Bharthi*⁽²⁾. We may refer also to *Uji v. Hathi Lahu*⁽³⁾, decided in 1870, where it was held that a custom which authorised a woman to contract a second marriage without a divorce, on payment of a certain sum to the caste, was an immoral custom which should not be judicially recognised. The custom in the present case seems to stand on no higher position; for if the mere payment of money to the caste cannot serve to validate a remarriage without a divorce, the same reasoning would make it insufficient to validate a divorce without the consent of the other spouse, as the effect in the dissolution of the marriage bond would be substantially the same in both cases.

On these grounds we are of opinion that in the wife's suit for dissolution of marriage the appeal must be allowed and the suit dismissed with costs throughout. Mr. Gokuldas for the wife has read affidavits declaring

(1) (1864) 2 Bom. H. C. R. 124. (2) (1877) 2 Bom. 140.

(3) (1870) 7 Bom. H. C. R. (A. C. J.) 133.

that since the lower Court's decree the wife has contracted a second marriage with another man, but that fact appears to us to have no relevance to the only question raised in the appeal, the question, namely, whether she was entitled to divorce her first husband by virtue of the caste-custom.

In the husband's suit for restitution of conjugal rights, the only defence now made is the divorce based on the alleged custom, and, since that fails, the suit must be decreed with costs throughout.

Decrees reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

KHATIJA, DAUGHTER OF MAHAMADALLI ABDULALLI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHEKH ADAM HUSENALLY VASI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Court-Fees Act (VII of 1870), section 7, clause IV (f) and section 11—Suit for accounts and administration—Valuation of the suit for purposes of court fees.

In a suit for accounts and administration of the estate by the Court, the claim was valued at Rs. 130 for purposes of court fees and at Rs. 30,00,000, for purposes of jurisdiction and pleader's fees. It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate. This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs. 67,968-12-0.

On appeal to the High Court,

* First Appeal No. 23 of 1914.

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Held, that having regard to the statements in the plaint an administration suit was maintainable and that it could be treated as a suit for account. The plaintiff would, therefore, be at liberty to value it at Rs. 130 or any other sum under section 7, clause IV (f) of the Court Fees Act.

In the event of a decree being passed for a larger amount than that covered by the fees already paid, the plaintiff would be precluded by the provisions of section 11 of the said Act from executing such decree until fees liable on the whole amount of the decree had been paid.

APPEAL against the decision of Motiram S. Advani, District Judge of Surat, rejecting the memorandum of appeal against the order made by N. R. Majumdar, First class Subordinate Judge at Surat rejecting the plaintiff's suit.

One Tyebally Sheikh Adam carrying on business at Surat, Aden, Hudeida, Jedda and other places outside India died in the year 1876 leaving considerable moveable and immoveable property. Plaintiff as his heir sued for an order directing the administration through Court of the estate of deceased Tyebally and for ascertainment, separation and delivery to her of her share of the residue of the estate. In paragraph 34 of the plaint plaintiff stated:—

"Since the accounts of the said estate and effects and of the business have not been made up, and many of the heirs of Tyebally Sheik Adam have died leaving heirs behind them, and several out of them have been removed from the property of the firm...I have no means of knowing who the claimants are, who can at present legally get their shares, and which of the heirs now desire to put forward their claims, and what property and claims and liabilities there are, and whose and of what nature the claims and interests in the firm's property there are at present, and what amount of property may be found on taking accounts of the business. Similarly as it is necessary to examine the accounts from the books of the firm, in order to know all this definitely, the value of this claim cannot be ascertained. For this and other reasons I am obliged to file this suit for taking accounts and for getting the estate administered."

The suit was valued at Rs. 130 for purposes of court fees and for purposes of jurisdiction and pleader's fee at Rs. 30,00,000. The defendants contended that the suit

had not been properly valued for the purpose of court fees and that the plaint should, therefore, be rejected.

The Subordinate Judge held that on the facts stated an administration suit was not maintainable. His reasons were as follows:—

“ I think that on the facts stated an administration suit is not maintainable. The administration of the estate of a deceased person consists, first in paying his funeral expenses, next, his debts, and then the legacies under the will (if any). The residue of his estate is then to be divided amongst the residuary legatees, if any, or amongst his heirs if he has left no will. In the present instance, the deceased died intestate more than 35 years ago, and no funeral charges, no legacies and no debts are to be paid or collected. The remarks made in the case of *Prosono Kumari Devi v. Ramchandra Singh and others*, 17 Ind. Cas. 155, apply, therefore, to this case also.”

He was, however, prepared to treat it as a suit for partition provided the plaintiff paid an *ad valorem* court fee on the value of her share and amended the plaint by stating what share she had. He observed:—

“The object of the plaintiff in calling her suit an administration suit is to evade the payment of the proper court fee; but if that was her object that object would not have been saved even if I had held that an administration suit was maintainable. An administration suit is a suit for an account and falls within section 7, paragraph 4, clause (f) of the Court Fees Act—*Ma Ma v. Ma Hinan*, 4 L. B. R. 229. * * *

In the present case the value put for purposes of jurisdiction and value fee is 30 lacs. The plaintiff's share is 29/1280 and so its value is Rs. 67,968-12-0. She would have been directed to pay an *ad valorem* fee on this sum, amounting to Rs. 1,275-0-0 even if she had been permitted to proceed with the suit in its present form. The plaintiff if she amend the plaint as directed will pay court fee not less than Rs. 1,275 minus Rs. 10.”

The plaintiff appealed to the District Judge. The appeal was valued for court fees and pleader's fees at Rs. 130, and bore a stamp of Rs. 10. The learned Judge held that this was not sufficient. He remarked:—

“The appellant has treated her suit as an administration suit. It is not an administration suit. This is clear from the plaint. She claims her share in the property. The value of her share is Rs. 67,968-12-0; stamp duty should be paid on this amount. Deficiency to be made good within ten days.”

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As the stamp was not paid, the memorandum of appeal was rejected.

The plaintiff appealed to the High Court.

Manubhai Nanabhai for the appellant:—The lower Courts are wrong in holding that an administration suit is not maintainable. The estate of the deceased has to be ascertained, realized and administered under the directions of the Court. The accounts should be taken, outstandings recovered, the debts and liabilities paid and the business wound up. Till then it is not possible to know what amount is available for distribution among the heirs. The share of the plaintiff has also to be ascertained. The plaintiff may, therefore, treat this as a suit for accounts in which case it is open to her to value the suit at Rs. 130 or at any amount she likes: see *Bai Hiragavri v. Gulabdas*⁽¹⁾; *Manohar Ganesh v. Bawa Ramcharandas*⁽²⁾; *Govandas Kasandas v. Dayabhai Savaichand*⁽³⁾; *Sardarsingji v. Ganpat-singji*⁽⁴⁾; *Ramiah v. Ramasami*⁽⁵⁾; *Barru v. Lachhman*⁽⁶⁾.

Section 11 of the Court Fees Act will prevent the execution of the decree for a greater amount until the proper fee has been paid. This is sufficient safeguard for protecting the interest of the revenue.

G. S. Rao for the respondent No. 1:—This ought to be treated as a suit for partition and will fall under section 7, clause V of the Court Fees Act as being for possession of immoveable property. Section 7, clause IV (b) will not apply as the suit is to enforce not a right “to share” but “to a share” in the joint family property. The distinction has been pointed out in *Dagdu v. Totaram*⁽⁷⁾. Section 11 may not afford a complete answer in this case where immoveable property

(1) (1913) 15 Bom. L. R. 1123.

(4) (1892) 17 Bom. 56.

(2) (1877) 2 Bom. 219 at pp. 226-8.

(5) (1912) 24 Mad. L. J. 233.

(3) (1884) 9 Bom. 22.

(6) (1913) P. R. No. 111 of 1913.

(7) (1909) 33 Bom. 658 at p. 662.

forms the subject matter of the suit. Even if section 11 would ultimately protect the interests of the revenue, the defendants may object to go to trial until a properly stamped plaint is before the Court.

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N. K. Mehta for respondent No. 4 supported respondent No. 1.

B. D. Mehta for respondent Nos. 2, 22, 23 and 24 supported the appellant.

SCOTT, C. J. :—In this suit the plaintiff, a Mahomedan female, prays that accounts may be taken of the properties and business of the deceased Tyebally Sheikh Adam and his firm, and their claims and liabilities may be ascertained, and an order may be passed for its administration by the Court, and the claims of the claimants to the said estate and effects according to Mahomedan Law applicable to the Ismaili Daoodi Shiah Sect and according to the custom of the said Daoodi Bohora community may be ascertained, proper direction may be given for that purpose and her share according to the claim that may be ascertained may be separated from the said properties and handed over to her ; and that an order may be passed for the appointment of a receiver for the management of the properties and business of the deceased Tyebally Sheikh Adam and his firm pending this suit.

The suit was valued at Rs. 130 for purposes of Court fees. In the 39th paragraph of the plaint she says that "although it is not possible to fix the exact value of the property of the firm of Tyebally Sheikh Adam or of his any other property, according to my belief it must come to Rs. 30,00,000. For the purpose of the jurisdiction of the Court the claim has, therefore, been valued at Rs. 30,00,000."

It is argued on behalf of the defendants that the suit has not been properly valued for the purpose of Court fees, and that the plaint should, therefore, be rejected.

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That contention has found favour with the lower Courts in Surat. The learned District Judge from whom this appeal is preferred says that "the appellant has treated her suit as an administration suit. It is not an administration suit. This is clear from the plaint. She claims her share in the property. The value of her share is Rs. 67,968-12-0, and stamp duty should be paid on this amount. Deficiency to be made good within ten days." As the stamp duty was not paid the appeal to the District Court was rejected.

It is not disputed that the plaintiff's ancestor under whom she claims carried on business, and that the firm started by him known as Tyebally Sheikh Adam is still continuing. It is, however, disputed by the defendants that any of the immoveable properties in which it is suggested that plaintiff claims a share belonged to the firm of Tyebally Sheikh Adam or to Tyeballi himself, and it is suggested to us in argument by the respondents' pleader that their contention will be that all immoveable properties to which the plaintiff is supposed to lay claim belonged to a firm named Abdul Kadar Hasanally, and that she has no interest in the same. The statement is of value in this appeal, because there is always the possibility that in suits of this nature the plaintiff is professing ignorance as to specific properties where she has certain knowledge and could specify definite properties in which she is entitled to a share of a definite value. But in view of the position taken up by the defendants there is ground for supposing that the statement in paragraph 34 of the plaint represents the true position as far as the plaintiff is concerned. In that paragraph she says:—

"Since the accounts of the said estate and effects and of the business have not been made up, and many of the heirs of Tyebally Sheikh Adam have died leaving heirs behind them, and several out of them have been removed from the property of the firm, I have no means of knowing whether they have come to any understanding with the manager of the said firm. For that

reason also, I have no means of knowing who the claimants are, who can at present legally get their shares, and which of the heirs now desire to put forward their claims, and what property and claims and liabilities there are, and whose and of what nature the claims and interests in the firm's property there are at present, and what amount of property may be found on taking the accounts of the business. Similarly, as it is necessary to examine the accounts from the books of the firm, in order to know all this definitely, the value of this claim cannot be ascertained. For this and other reasons I am obliged to file this suit for taking accounts and for getting the estate administered."

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There being then no apparent ground for distrusting the statements in that paragraph, the *dictum* of the learned District Judge that this is not an administration suit cannot be supported. According to the provisions of the Court Fees Act, if the plaintiff succeeds in showing upon the accounts that she is entitled to a share in the property and assets of Tyeballi Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of section 11 of the Court Fees Act until the difference between Rs. 130 and the fee which would have been payable, had the suit comprised the whole of the amount decreed, has been paid to the proper Officer. That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under section 7, clause IV(f) of the Court Fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases.

For these reasons we are unable to accept the decision of the learned District Judge. We set aside the rejection of the plaint and direct that it be taken on the file, and the plaintiff be allowed to proceed with the suit. The plaintiff must have from the defendants her costs in three Courts referable to the question of Court fee.

Order set aside.

J. G. R.

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April 9.

SONU JANARDAN KULKARNI (ORIGINAL PLAINTIFF), APPLICANT, v.
ARJUN WALAD BARKU KUNBI (ORIGINAL DEFENDANT) OPPONENT.*

Bombay Mamlatdars' Courts Act (Bombay Act II of 1906), section 23 (a)—Possessory Suit—District Deputy Collector's authority to revise—Bombay General Clauses Act (Bombay Act I of 1904) section 3 (b)—The term "Collector" does not include "District Deputy Collector"—Land Revenue Code (Bombay Act V of 1879), section 10 (c).

* Civil Extra Ordinary Application No. 273 of 1914.

(a) The Bombay Mamlatdars' Courts Act (II of 1906), section 23, runs as follows :—

"23. (1) There shall be no appeal from any order passed by a Mamlatdar under this Act.

(2) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit.

(3) Where the Collector takes any proceedings under this Act he shall be deemed to be a Court under this Act."

(b) The Bombay General Clauses Act (Bombay Act I of 1904), section 3, runs as follows :—

"3. (11) In this Act, and in all Bombay Acts made after the commencement of this Act, unless there is anything repugnant in the subject or context—"Collector" shall mean, in the City or Bombay, the Collector of Bombay and elsewhere the chief officer in charge of the revenue-administration of a district."

(c) The Bombay Land Revenue Code (Bombay Act V of 1879), section 10, runs as follows :—

"10. Subject to the general orders of Government, a Collector may place any of his assistants or deputies in charge of the revenue-administration of one or more of the talukas in his district, or may himself retain charge thereof.

The term "Collector" in section 23 of the Mamlatdars' Courts Act (Bom. Act II of 1906) does not include "District Deputy Collector" in view of the express definition of the term in section 3 of the Bombay General Clauses Act (Bom. Act I of 1904). A District Deputy Collector has, therefore, no authority to pass any order under the Mamlatdars' Courts Act (Bom. Act II of 1906).

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Keshar v. Jairam⁽¹⁾ dissented from.

THIS was an application under section 115 of the Civil Procedure Code (Act V of 1908), to revise the order passed by G. V. Joglekar, District Deputy Collector, N. D. East Khandesh, reversing the order passed by S. G. Bhadbhade, Mamlatdar of Erandol.

The plaintiff filed a suit against the defendant under the provisions of the Mamlatdars' Courts Act (Bombay Act II of 1906) in the Court of the Mamlatdar of Erandol, praying for possession of certain fields. The Mamlatdar decided the suit in plaintiff's favour. The defendant preferred an application for revision to the District Deputy Collector who reversed the order of the Mamlatdar and directed that the property if already delivered into the possession of the plaintiff be restored to the defendant.

The plaintiff applied to the High Court.

Any Assistant or Deputy Collector thus placed in charge shall, subject to the provisions of chapter XIII, perform all the duties and exercise all the powers conferred upon a Collector by this Act or any other law at the time being in force, so far as regards the taluka or talukas in his charge.

Provided that the Collector may, whenever he may deem fit, direct any such assistant or deputy not to perform certain duties or exercise certain powers, and may reserve the same to himself or assign them to any other assistant or deputy subordinate to him.

To such Assistant or Deputy Collector as it may not be possible or expedient to place in charge of talukas the Collector shall, under the general orders of Government, assign such particular duties and powers as he may from time to time see fit."

(1) (1911) 36 Bom. 123

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P. V. Kane for applicant (plaintiff):—The District Deputy Collector had no jurisdiction to revise the order passed by the Mamlatdar under the Mamlatdars' Courts Act. Section 23 (2) of the Act authorises the Collector to revise the orders of the Mamlatdars. The word "Collector" is defined in the Bombay General Clauses Act (Bom. Act I of 1904), section 3 (11) to mean in the City of Bombay, the Collector of Bombay, and elsewhere the Chief Officer in charge of the Revenue Administration of a District. The District Deputy Collector is not the Chief Officer in charge of the Revenue Administration of a District. Jurisdiction can be conferred on the Deputy Collector only by importing section 10 of the Land Revenue Code into the Mamlatdars' Courts Act. But that cannot be done. The Mamlatdars' Courts Act is a complete enactment in itself so far as the powers of appeal and revision in proceedings under it are concerned. Section 10 authorises the Collector to place Assistant or Deputy Collectors in charge of the revenue administration of a Taluka or Talukas and to exercise all the powers of a Collector so far as those Talukas are concerned. Proceedings under the Mamlatdars' Courts Act are judicial and cannot be looked upon as part of the revenue administration of a District.

P. B. Shingne for opponent (defendant):—Section 10 of the Land Revenue Code (Bom. Act V of 1879) must be read alongside of the Mamlatdars' Courts Act. In *Keshav v. Jairam*⁽¹⁾ it was held by this Court that an Assistant Collector who is placed in charge of the revenue administration of portions of a District under section 10 of the Land Revenue Code has jurisdiction to revise the orders passed by a Mamlatdar under the Mamlatdars' Courts Act. Moreover, a civil Court would not have ordered delivery of possession in favour

⁽¹⁾ (1911) 36 Bom. 123.

of a landlord simply because the tenant failed to pay rent as stipulated.

Kane in reply :—If the provisions of the Land Revenue Code be imported into the Mamlatdars' Courts Act, anomalies would result. An appeal will lie against the order made by the Deputy Collector to the Collector under section 203 of the Land Revenue Code. This would be against the intention of the legislature as gathered from section 23 of the Mamlatdars' Courts Act.

SCOTT, C. J. :—This is a petition under section 115 of the Civil Procedure Code by the plaintiff in the Mamlatdar's Court at Erandol in East Khandesh who sued for possession of certain lands under the Mamlatdars' Courts Act. The Mamlatdar of Erandol after recording evidence ordered possession to be given to the applicant. An application was then preferred purporting to be in revision under section 23 of the Mamlatdars' Courts Act to the District Deputy Collector of East Khandesh who reversed the decision of the Mamlatdar of Erandol. The petitioner contends that the District Deputy Collector had no authority to act under the Mamlatdars' Courts Act. That Act is Bombay Act II of 1906. Section 23 provides : "There shall be no appeal from any order passed by a Mamlatdar under this Act. But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit."

Now unless the term "Collector" includes "District Deputy Collector" in that section, the District Deputy Collector has no authority to act under the Mamlatdars' Courts Act. The expression "Collector" is not defined in the Act itself, but it is defined in the previous

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Bombay General Clauses Act (Bom. Act I of 1904), for the purpose of all Bombay Acts made after the 30th May 1904. Section 3 of that Act provides that : "In this Act, and in all Bombay Acts made after the commencement of this Act, unless there is anything repugnant in the subject or context, 'Collector' shall mean, in the City of Bombay, the Collector of Bombay, and elsewhere the chief officer in charge of the revenue-administration of a District." It is not contended that the District Deputy Collector is the chief officer in charge of the revenue-administration of the District of East Khandesh. But it is argued that by reason of certain powers having been delegated to the District Deputy Collector by the Collector under section 10 of the Land Revenue Code, the District Deputy Collector is, therefore, a Collector within the meaning of section 23 of the Mamlatdars' Courts Act of 1906. The Land Revenue Code, section 10, provides that : "Subject to the general orders of Government, a Collector may place any of his assistants or deputies in charge of the revenue-administration of one or more of the talukas in his district, or may himself retain charge thereof. Any Assistant or Deputy Collector thus placed in charge shall, subject to the provisions of Chapter XIII, perform all the duties and exercise all the powers conferred upon a Collector by this Act or any other law at the time being in force, so far as regards the taluka or talukas in his charge." The powers of a Deputy Collector would, therefore, not extend beyond the Taluka or Talukas of the District which shall have been placed specially in his charge, and he could not be the chief revenue officer in charge of the revenue-administration of a District. Chapter XIII, to which reference is made in section 10 provides that : "In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a Revenue-officer

under this Act or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not." If, therefore, the argument for the opponent is correct, and "any law for the time being in force," includes the Mamlatdars' Courts Act of 1906, an appeal would lie from the decision of the Deputy Collector under section 23 to the Collector, and from the Collector to the Commissioner, because there is no express provision to the contrary in the Act. The absurdity of this conclusion suggests that the words "any law for the time being in force" must relate to any law *ejusdem generis* with the Land Revenue Code and would not embrace the special law relating to Mamlatdars' Courts such as we have in the Act of 1906.

We have, however, been referred to a decision of a Bench of this Court in *Keshav v. Jairam*⁽¹⁾, in which it was held that by virtue of the Land Revenue Code, section 10, an Assistant Collector in charge of portions of a District was entitled to exercise the revisional powers of the Collector under section 23 of the Mamlatdars' Courts Act. It is apparent from the report that the provisions of the Bombay General Clauses Act of 1904 were not brought to the notice of the Court, particularly the words "unless there is anything repugnant in the subject or context" of the Act to be construed, for Mr. Justice Beaman in his judgment states that, on a first view, it would appear that an Assistant Collector could not be authorised to exercise the revisional powers under section 23. In view of the express definition in section 3 of the General Clauses Act we feel bound to decide that the District Deputy Collector had no authority to pass any order under the Mamlatdars' Courts Act of 1906. He has, however,

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assumed to act judicially, and is, therefore, according to the ruling in *The Collector of Thana v. Bhaskar Mahadev Sheth*⁽¹⁾, to be treated as a Court under the superintendence of the High Court whose proceedings can be revised under the extraordinary jurisdiction. The question then is what order should be passed under section 115. We declare that the order of the District Deputy Collector is a nullity as being without jurisdiction of any kind, and direct that the application of the defendant for revision under the Mamlatdars' Courts Act be taken on the file of the Collector, and be disposed of by him according to law. Having regard to the decision in *Keshav v. Jairam*⁽²⁾, we think that there should be no order as to costs of this application.

Order set aside.

J. G. R.

⁽¹⁾ (1884) 8 Bom. 264 at p. 268.

⁽²⁾ (1911) 36 Bom. 123.

CRIMINAL REVISION.

1915.

April 30.

Before Mr. Justice Beaman and Mr. Justice Macleod.

EMPEROR v. A. GOODHEW.*

Merchant Seamen Act (I of 1859), section 83, clause 4—Merchant Shipping Act (57 and 58 Vic. C. 60), sections 114, clause 3, and 225, clauses (b) and (c)†—Wilful disobedience of lawful commands—Order given to transfer from one ship to another—Seaman disobeying the order—Clause about transfer in articles of agreement not ultra vires.

* Criminal Appeal No. 120 of 1915, subsequently turned into Revisional application.

† The material portions of the sections run as follows :—

SECTION 114, clause (3).—"The agreement with the crew shall be so framed as to admit of such stipulations, to be adopted at the will of the master and seamen in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law."

The accused signed articles of agreement in London with the Master of the SS. Arcadia (a steamer belonging to the Peninsular and Oriental Steam Navigation Company), under which he agreed *inter alia* to obey the lawful commands of the Master or the superior Officers, and to transfer to any other vessel of the Company, when required during the period of service. These articles were initialled by an Officer of the Board of Trade. When the SS. Arcadia arrived in the Bombay Harbour it was sold by the Company to an Indian Merchant. The accused was then ordered by the Marine Superintendent of the Company in the presence of the Chief Officer of the SS. Arcadia to transfer himself to the SS. Salsette, another boat belonging to the Company. For a wilful disobedience of this order, the accused was convicted under section 83, clause 4 of the Merchant Seamen Act (I of 1859). The accused applied to the High Court against the conviction, contending, first, that the article respecting transfer was *ultra vires*, and secondly, that the order as to transfer given by the Marine Superintendent of the Company was not a lawful command :—

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Held, that having regard to section 114, clause 3 of the Merchant Shipping Act (57 and 58 Vic. C. 60) and to the fact that the articles of agreement had been initialled by an Officer of the Board of Trade, the article as to transfer was not *ultra vires*.

Held, further, the order to transfer having been given by the Marine Superintendent of the Company in the presence of the Chief Officer of the SS. Arcadia was a lawful command of the latter, failure to obey which was punishable under section 83, clause 4 of the Merchant Seamen Act (I of 1859).

THIS was an application, under the criminal revisional jurisdiction of the High Court, against conviction and sentence recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

SECTION 225 (1).—"If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows ; that is to say,

* * * *

(b) If he is guilty of wilful disobedience to any lawful command, he shall be liable to imprisonment for a period not exceeding four weeks, and also, at the discretion of the Court, to forfeit out of his wages a sum not exceeding two days' pay : "

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The accused, a British Seaman, signed, on the 24th November 1914 at London, articles of agreement with the Master of the SS. Arcadia, a steamer belonging to the Peninsular and Oriental Steam Navigation Company. Those articles were initialled by an Officer of the Board of Trade. The material articles ran as follows :—

“ And the crew agree to conduct themselves in an orderly, faithful, honest and sober manner and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any Person who shall lawfully succeed him, and of their Superior Officer, in everything relating to the said ship.

“ And it is also agreed that the crew or any member thereof may be transferred if required, at any port and at any time during the period of this agreement to any other vessel of the Company, wages, capacity and turn of service being the same.”

When the SS. Arcadia arrived in the Bombay Harbour in January 1915, she was sold by the Company to an Indian Merchant. The accused was then asked to transfer himself to the SS. Salsette, another steamer belonging to the same Company. The order to transfer was given by the Marine Superintendent of the Company in the presence and within the hearing of the Chief Officer of the SS. Arcadia.

The accused having failed to obey the order was charged with wilful disobedience of lawful commands under section 83 of the Merchant Seamen Act (I of 1859) and section 225, clauses (b) and (c) of the Merchant Shipping Act (57 and 58 Vic. C. 60).

The trying Magistrate convicted the accused under section 83, clause 4 of the Merchant Seamen Act (I of 1859), and sentenced him to simple imprisonment for one day and to forfeit two days' pay.

The accused applied to the High Court against this conviction and sentence.

Kolaskar, with K. F. Nariman, for the accused.

F. S. Taleyarkhan, with *Little and Co.*, for the P. and O. S. N. Company.

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BEAMAN, J.:—The applicant has been convicted by the Chief Presidency Magistrate of an offence under section 83 of the Merchant Seamen Act and sentenced to one day's simple imprisonment and to forfeit two days' pay. He has applied to this Court and a rule was issued by Heaton and Shah JJ. We take it then that we are dealing with this case in revision. It was contended that the applicant had a right of regular appeal; but in view of what had already passed and the applicant's counsel being unable to support his contention by reference to any section in the Code of Criminal Procedure, it is clear that this was not the view of Heaton and Shah JJ., and the present contention cannot be sustained.

Now the material facts are that the applicant signed the usual articles of agreement with the Captain of the Steamship "Arcadia" for a term of one year's service. In addition to the stereotyped form certain clauses were added under which *inter alia* the applicant agreed to accept a transfer from that to any other of the P. and O. Company's Steamship. These additional terms have been challenged in the course of this argument as being *ultra vires*. Having regard, however, to section 114, clause (3) of the Merchant Shipping Act, and to the fact that they have been initialled by an officer of the Board of Trade, we cannot accede to that contention. We have no doubt that the terms were *intra vires* and that they were subscribed by the applicant with full knowledge.

That being so, the next question which arises is whether or not when the Ship "Arcadia" had been disposed of by the P. and O. Company and this member of the crew was ordered by the Marine Superintendent

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to tranship to the Salsette, that order was one which he was bound to obey under section 83. He has been convicted of disobedience of a lawful order and the only question, in our opinion, of any importance here is whether or not the order given by the person and in the circumstances stated is such a lawful order as was contemplated in the section. Of the liability of the applicant to tranship under the clause, we can entertain no doubt whatever, but, looking to the language of that agreement, it appears, that the applicant bound himself to obey the Master of the Ship his successor in office, should any such be appointed, and the other superior officers (for such we take to be the meaning of the words "their superior officers") of the ship. This would not ordinarily comprise the Marine Superintendent and had the order been given by the Marine Superintendent alone, it might reasonably have been contended that the applicant was under no obligation to obey such an order or recognize the authority of that individual. This point has not been made as clear as it should have been, in the Chief Presidency Magistrate's Court, considering the importance attached to the case by the P. and O. Company. This much, however, is clear that when the order was given by Captain Daldy to the applicant, the Chief Officer of the *Arcadia* was standing by. It has been stated to us on behalf of the Company that what in fact happened was that the Marine Superintendent had sent his orders for the transhipment of this member of the crew of the '*Salsette*' to the Chief Officer and that the Chief Officer had given that order to the applicant. The applicant refused to obey it in consequence of which the Marine Superintendent in the presence of the Chief Officer repeated the order. Unfortunately these statements are not supported by any evidence. It appears clear, however, on the virtually admitted fact that the order was given in the presence of the Chief Officer, that the

applicant could have been under no real misunderstanding as to the authority behind it. We think, therefore, that the contention is little better than quibbling and no substantial effect ought to be given to it.

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All the requirements of section 83 have been sufficiently complied with. The applicant was liable to be transhipped. He was ordered to tranship, if not actually by, still in the presence of, the Chief Officer and obviously with his sanction and approval. And we take it that he knew perfectly well that the order came to him weighted with that authority which, by his own agreement, he was bound to acknowledge and obey.

We are, therefore, satisfied that no injustice has been done to the applicant and that the conviction and sentence which are made the subject of this revisional application ought not to be disturbed. We, therefore, discharge the rule.

Rule discharged.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

AMIRBIBI (PLAINTIFF) v. AZIZABIBI AND OTHERS (DEFENDANTS).*

Mussalman Wakf Validating Act (VI of 1913), section 3—Construction of Statute—Whether effect retrospective—Wakf—Mahomedan Law.

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The Mussalman Wakf Validating Act, 1913, has no retrospective effect and consequently the old law applies to wakfs created before the passing of that Act.

ONE Shaik Abdulla bin Shaik Ibrahim died on the 14th of August 1906 leaving him surviving as his only

* O. C. J. Suit No. 29 of 1914.

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heirs according to Mahomedan Law, his two daughters Amirbibi and Azizabibi. Prior to his death the said Shaik Abdulla on the 23rd of March 1901 executed a deed-poll by which he declared in effect that he held certain immoveable property belonging to him in Huza-ria Street in wakf, as a Mutavali or trustee, upon certain trusts. The plaintiff Amirbibi filed this suit against her sister Azizabibi and her sister's son praying for a declaration that the said deed-poll was void and of no effect and that the immoveable property therein mentioned belonged absolutely to the plaintiff and her sister, the first defendant, as sole heirs of the said Shaik Abdulla.

The Advocate General was made a party to the suit as the said deed-poll purported to create certain religious and charitable trusts.

Mirza and *Mulla* for the plaintiff and first defendant.
Second defendant in person.

Jardine (acting Advocate General) for the third de-fendant.

MACLEOD, J.:—One Shaik Abdulla bin Shaik Ebrahim, a Sunni Mahomedan, died at Bombay on or about the 14th of August 1906 leaving him surviving as his only heirs according to Mahomedan Law two daughters Amirbibi and Azizabibi. By a deed-poll dated the 23rd March 1901 the said Shaik Abdulla declared in effect that he held certain property belonging to him in Huza-ria Street in wakf as a Mutavali or trustee upon the trusts following, *viz.*:—

“(a) Out of the net rents of the said property to feed five fakirs every friday night, to pay for reading the Koran every month and for Fatiha ceremonies in the months of Mohram, Rabinlakhari, Rajab and Ram-zan and for offering every month oil two and half seers for lighting the Masjid situated in Huzaria Street.

"(b) To pay the balance of the said rents to his daughters and any other child that might thereafter be born to the settlor in equal shares for their maintenance and the maintenance of their children therein named, and after the death of his daughters to pay the same to the second defendant and the said Yakubkhan and Dawoodkhan and their descendants generation after generation, as well as the settlor's descendants, male or female, generation after generation.

"(c) On failure of descendants to use the balance of the said rents for the benefit of the settlor's community or for meritorious acts or for the use of the said Masjid, as the trustee for the time being might think proper."

The annual gross income of the property is said to be Rs. 960 and the annual net income about Rs. 800. The amount required for the purposes set forth in sub-cl. (a) of para. 2 of the plaint is said to be about Rs. 64.

The plaintiff as one of the daughters of the deceased has filed this suit against her sister and her sister's son and the Advocate General, praying that it may be declared that the said deed-poll is void and of no effect and that the plaintiff and the first defendant, as the sole heirs of the said Shaik Abdulla, are absolutely entitled to the said immoveable property.

The deceased had executed a similar deed-poll in respect of another property on the same day and that deed-poll was the subject-matter of Suit No. 857 of 1911 in which a decree was passed on the 13th February 1912 by Mr. Justice Beaman, by which it was declared that the deed of settlement mentioned in the plaint was null and void except as regards the charities mentioned in Ex. B to the plaint. The decree further ordered that plaintiff and the first defendant should invest a certain sum to provide for those charitable purposes, and

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declared that when they had so done they would be absolutely entitled to the immoveable property mentioned in the deed.

It cannot be doubted that under the decisions of the Privy Council, the deed in this suit would have to be declared to be void except as regards the charities mentioned in sub-cl. (a) of para. 2 of the plaint. But it has been contended that those decisions no longer apply, now that the Mussalman Wakf Validating Act VI of 1913 has been passed. It is argued that the effect of that Act is retrospective and that all deeds of wakfs hitherto created which might be declared void and of no effect, if brought before the Courts, are now made good, and there is some ground for that argument in the preamble of the Act. But there is a distinct conflict between the preamble of the Act and the Act itself. The preamble runs as follows :—

“Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes ; and whereas it is expedient to remove such doubts ; It is hereby enacted”—

A preamble sets forth the reason for the particular Act of the Legislature and foreshadows what is intended to be effected by the Act. But to see what has been actually effected by the Act, one must look to the Act itself, and the Act seems to have failed entirely to produce the effect which, it might be gathered from the preamble, was intended, that is to say, intended according to the construction put upon it by the Advocate General. The word “created” in the preamble might be read as including not only wakfs to be created in the future but also wakfs already created in the past.

It may have been the intention to validate all wakfs which could be set aside under the previous decisions of the Privy Council when they came before the Courts, or it may have been intended that if such wakfs were created in future, they would under the Act be held good. These are the alternative constructions which can be applied to the preamble. Then turning to the Act itself, it curiously enough does not provide, as is usually the case, for the date on which the Act shall come into force. Therefore I presume the Act came into force on the day it received the assent of the Governor General in Council. The Act refers solely to wakfs which shall be created in the future. Section 3 says: "It shall be lawful for any person professing the Mussalman faith to create a wakf, which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :—"

There is nothing in the Act about wakfs which are already in existence when the Act was passed, and there is nothing in the Act which enables me to hold that the provisions of the Act shall apply to such wakfs; and therefore, in my opinion, whatever the intention of the Legislature may have been, it has by this Act only enabled Mahomedans in future to create wakfs by deeds which, under the previous decisions, would be liable to be set aside, as contrary to the provisions of Mussalman law, and therefore as regards this wakf which was created in March 1901 the old law applies. As the deed is clearly intended to effect a permanent settlement of the property on the settlor's descendants and the ultimate gift to charity is purely illusory, the deed must be set aside except as regards the charities referred to above which can be given effect to.

It has been arranged between the Advocate General on the one hand and the plaintiff and the defendants on the other hand that Government Promissory Notes of the

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nominal value of Rs. 2,400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done the property will be declared the absolute property of the plaintiff and the first defendant.

Costs will come out of the settled property, those of the third defendant as between attorney and client.

Order accordingly.

Attorneys for the plaintiff : Messrs. *Sabnis and Goregaonkar*.

Attorneys for the respondent : Messrs. *Little & Co.*

M. F. N.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1914.

December 18.

TRIBHOVANDAS NAROTAMDAS, PLAINTIFF v. ABDULALLY HAKIMJI PAGHDIVALA AND OTHERS, DEFENDANTS.*

Civil Procedure Code (Act V of 1908), Order XXII, Rule 10—Lease, forfeiture of—Insolvency of a defendant—Vesting of his estate and effects in the Official Assignee—Refusal of Official Assignee to defend the suit—Inability of defendant to defend independently of the Official Assignee—Practice.

In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant, no cause of action survives against a defendant who has become insolvent and whose estate has vested in the Official Assignee. If in such a case the Official Assignee refuses to defend a suit affecting the estate of the insolvent, the latter cannot defend independently of the Official Assignee.

THE plaintiff filed this suit as a short cause against the first defendant alone praying for a declaration

* O. C. J. Suit No. 102 of 1913.

that a certain lease dated the 1st of June 1894 had been forfeited by reason of the breach by the defendant of divers covenants contained therein and for an order that the first defendant should forthwith vacate and deliver up peaceful possession to the plaintiff of the land messuages and premises demised by the said lease and also that the said defendant should pay to the plaintiff certain monies due by way of rent in respect of the said property, under the terms of the said lease.

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The suit came on for hearing on the 8th of January 1914 when, as the first defendant did not appear, an *ex parte* decree was passed against him by Beaman J. On the 9th April 1914 the first defendant issued a rule *nisi* to have the *ex parte* decree set aside alleging that he had not been served with a summons and that he came to know of the suit only on the 30th of March 1914.

The said rule was made absolute on the 15th of June 1914 by Davar J. who fixed the 26th of June 1914 for the rehearing of the suit before Beaman J.

In the meantime on or about the 26th of June 1914 it was discovered that on the 9th of March 1914 the first defendant had petitioned the Court in its insolvency jurisdiction to be adjudged an insolvent and by an order made on the same day he was adjudged an insolvent and his estate and effects were vested in the Official Assignee.

This fact the first defendant suppressed from the Court when he made his application to have the *ex parte* decree abovementioned set aside. Subsequently the Official Assignee was added as a party defendant (third defendant) to the suit, but he did not file a written statement.

The second defendant was made a party inasmuch as he was a purchaser of the property in the suit at an

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auCTION sale held by the first defendant's mortgagee after the institution of and with full notice of the suit. He consented to the *ex parte* decree and did not afterwards apply for it to be set aside. At the rehearing the plaintiff applied for an *ex parte* decree against the third defendant the Official Assignee on the ground that the first defendant should not be permitted to defend the suit as all his interest in the property in dispute had devolved upon the third defendant.

Rustam Wadia, Kanga, and Setalvad for the plaintiff.

Bahadurji and Weldon for the first defendant.

BEAMAN, J.:—The facts material to the decision of the preliminary point are admitted to be these, that the suit was brought against the first defendant and while the suit was pending and after an *ex parte* decree had been made against him, he became an insolvent. About a month after his insolvency, he applied to have the *ex parte* decree set aside and the matter was argued before Davar J. without any mention being made of the first defendant having been adjudicated an insolvent. Davar J. set aside the *ex parte* decree, and about a month later, it appears to have come to the plaintiff's knowledge that the first defendant was an insolvent. Correspondence with the Official Assignee followed. Leave seems to have been obtained to bring the Official Assignee on the record under Order XXII, Rule 10. That has been done. The Official Assignee subsequently refused to defend the suit. The first defendant, however, has elected to defend independently of the Official Assignee and appears here by two counsel. The question is, whether he can be allowed to defend the suit. Notwithstanding the elaborate decision of Sir Joseph Arnould in the case of

In re Hunt, Monnet & Co. v. Bholagir Mangir et al⁽¹⁾ upon which the first defendant's learned counsel strongly relies, and the decision on the Original Side of the Calcutta High Court in the case of *Chandmull v. Ranee Soondery Dossee*⁽²⁾ following Sir Joseph Arnould's decision, it appears to me very clear, not only on principle but under the express words of our Statute, that no cause of action at present survives against the first defendant, and that the suit against him ought to be dismissed at once. It is a clear case of his interest in the plaint property having devolved upon the Official Assignee. The Official Assignee has been made a party to this suit with the leave of the Court. It is obvious, then, that he and the first defendant from whom the said interest has devolved upon him, cannot, in reason, both stand together on the array. The only person at present who possesses any interest whatever in this property from the point of view of the plaint in the present suit is not the first defendant but the Official Assignee. It is, therefore, a case in which the first defendant is being wrongly sued in the events that have happened and not a case in which it is unnecessary that the Official Assignee should be made a party-defendant.

The only question remaining to be answered is, whether, in thus dismissing the suit against the first defendant, he should have his costs. Up to the appearance before my brother Davar J. I see no reason why he should not have them. But inasmuch as he there withheld from the learned Judge what ought to have been disclosed and what being disclosed would have rendered his further appearance on the record unnecessary, in my opinion, he is not entitled to the costs of that or subsequent proceedings.

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⁽¹⁾ (1864) 1 Bom. H. C. R. 251.⁽²⁾ (1894) 22 Cal. 259.

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I must, therefore, now dismiss the suit against the first defendant with costs up to the application for the rule granted by Davar J., and thereafter no order as to his costs.

I may say that I believe that the object of this strange procedure is simply to endeavour to get a decree from the Court in favour of the first defendant without those, who are supplying him with funds, being under the risk of paying the plaintiff's costs, should the plaintiff succeed; for I understand no one has come forward to guarantee the Official Assignee's costs, should the Official Assignee have defended the suit in place of the first defendant.

Suit dismissed.

Attorneys for the plaintiff: Messrs. *Malvi, Hiralal, Mody & Co.*

Attorneys for the first defendant: Messrs. *Vachha & Co.*

M. F. N.

APPELLATE CIVIL.

1915.

April 9.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT, v. BAPUJI MAHADEO GOVAIKAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act (IX of 1908), section 10, Schedule I, Articles 14 and 120—Deposit—Order of the Collector refusing payment vested in trust—Specific purpose—No bar of time for recovery.

In 1835 C, an ancestor of the plaintiffs, had his immoveable property sold to satisfy his debt by the then Maharaja of Satara. Out of the sale-proceeds the debt was paid off and the balance of Rs. 1,793-0-5 was credited in

* First Appeal No. 19 of 1914.

the Government Treasury in the name of C. Subsequently when the Satara Principality ceased in the year 1848 the said amount came to be credited in C's name in the British Treasury. In 1859 C's descendants applied to the British Government for a refund of the amount when it was ordered that the amount be refunded after production of heirship certificate by the applicants and the order was communicated to the then applicants. Subsequently for a number of years there were litigations in Civil Court between C's descendants and the purchasers of C's property as regards the validity of sale. Ultimately in 1906 M, the father of the plaintiffs, made an application to the District Court for a certificate of heirship and an order for the issue of a certificate was passed on the 23rd March 1907. M then made an application on 16th October 1907 to the Collector of Satara requesting for a refund of the amount of Rs. 1,793-0-5 standing credited in C's name. This application was decided against the plaintiffs by the Collector on 6th March 1911. The plaintiffs then appealed to the Commissioner and the appeal was rejected on 17th July 1911. A further appeal to the Government met with a similar fate. Plaintiffs, therefore, on 15th June 1912 filed a suit against the defendant as trustee for the recovery of the amount alleging that the cause of action arose on 17th July 1911 the date when the Commissioner's order was received by the plaintiffs. The defendant contended that the cause of action arose on 6th March 1911 when the Collector rejected the plaintiffs' application and the suit was barred under Articles 14 and 120 of Schedule I of the Limitation Act (IX of 1908).

The lower Court, being of opinion that the money was at most held by the defendant on an implied trust, held that section 10 of the Limitation Act did not apply to the case and that the plaintiffs' claim could only be decreed on the ground that it was within time under Article 120 of the Limitation Act. The defendant having appealed to the High Court,

Held, that the money being vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in the name of C being specific, section 10 of the Limitation Act did apply.

Held further, that the plaintiffs were entitled to succeed on the ground not only that their claim did not fall within Article 14 and would be within time if it fell within Article 120 but that it was one to which the bar of limitation could not be pleaded.

APPEAL from the decision of C. A. Kincaid, District Judge of Satara.

The facts of the case were as follows :—One Chinto Mahipat Govaikar of Satara, ancestor of the plaintiffs,

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owed certain amounts to one Shaikh Sayed Mufati of Aurangabad who was an Arab and in order to satisfy the alleged debt Srimant Partapsinh Maharaj, the then Raja of Satara, caused Chinto Mahipats' immoveable property to be sold in 1835 and out of the sale proceeds the alleged debt was paid off and the balance Rs. 1,793-0-5 was credited in the Government Treasury in the name of Chinto Mahipat. Chinto refused to receive the money, alleging that the whole proceedings regarding the sale were illegal and endeavoured to get the British Resident to induce the Maharaja to have them nullified. In this he was not successful. But in 1839, the Maharaja Partapsinh was deposed and Govaikar approached the new Maharaja Shahaji II. The new ruler by his order dated 26th October 1839 directed that Chinto's property should be taken back from the purchasers at the auction sale and restored to him. The Maharaja undertook to reimburse the purchasers. This order, however, was never carried out and in 1846 Chinto died. In 1848 the Satara Principality ceased on the death of Shahaji II and its territories became part of the Bombay Presidency. Among the properties which passed into the hands of the British Government was the balance of Rs. 1,793-0-5 which awaited withdrawal by Govaikar. For nine years the money remained idle in the Satara Treasury. But, in 1857, the Collector issued a notice to Chinto's eldest son Sadashiv calling upon him to withdraw the amount. Sadashiv took no action on the notice. But, on the 13th June 1859, Sadashiv himself petitioned the Collector, asking that the money should be paid to him. In the meantime, however, Government had taken money out of the deposit account and had credited it to the profit and loss account. The Collector referred the matter to Government and he received a reply sanctioning the disbursement. But on 27th

June 1859 Rango, Chinto's second son, who was apparently on bad terms with his elder brother wrote to the Collector, objecting to the payment of money to Sadashiv and asking that it should be distributed among all the brothers equally. This objection was allowed and on 14th February 1860, the Mamlatdar of Satara issued a notice to such of Chinto's heirs as he could find to produce certificates of heriship. On this notice no action was taken as the heirs were endeavouring to recover by litigation the landed property of Chinto. Subsequently on 30th June 1906, Madhavrao Anant, Chinto's nephew and the father of the plaintiffs, who was then acting as manager of the family, filed an application for a certificate of heirship in the District Court, Satara, and on the 23rd March 1907 obtained it. On 6th October 1907 Madhavrao Anant, arrived with the certificate of heriship, applied for the refund of the money. Before he obtained a reply he died. But on the 13th May 1911 his heirs received an order, dated 6th March 1911, which ran as follows :—"As the application for the refund of Rs. 1,793-0-5 was made after about 50 years and as the reasons given for this delay did not appear to be sufficient and reliable, no orders could be issued for the refund of the amount in question." Against this ruling the plaintiffs appealed to the Commissioner but on 17th July 1911 their appeal was rejected. A further appeal to Government met with a similar fate. Plaintiffs, therefore, issued a notice to Government and on the 15th July 1912 filed the present suit against the Secretary of State in Council for Rs. 1,793-0-5 alleging that the cause of action arose on the 17th July 1911. They relied on section 10 of the Limitation Act on the ground that the money became vested in the British Government, on the termination of the Satara Principality, in trust for the specific purpose of being paid

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to Chinto Mahipat's heirs and that, therefore, their claim was not barred by any length of time.

The defendant admitted the facts but traversed the allegation that the cause of action arose on the 17th July 1911. It was contended that the cause of action if any at all arose on the 6th March 1911 when the Collector rejected the plaintiffs' application and the suit was barred under both Articles 14 and 120 of Schedule I of the Limitation Act.

The District Judge observed that section 10 of the Limitation Act was not applicable to the case as the deposit of Rs. 1,793-0-5 was not a trust within the meaning of the definition of "trust" in section 3 of the Trusts Act (II of 1882). He also found that article 14 of the Limitation Act did not apply as the order of the Collector was not an order of a judicial nature, but allowed the plaintiffs' suit as within time under Article 120 of the Act.

The defendant appealed to the High Court.

Ramdatt Desai (for the *Government Pleader*) for the appellant:—This issue of limitation has been wrongly decided by the lower Court. Article 120 does not apply. There could not be any trust presumed. In order to bring the case under section 10 of the Limitation Act, it must be shown that (1) the property became vested in Government in trust for a specific purpose and (2) that this suit is for the purpose of following the trust property in the hands of the defendant. The decision in *Secretary of State for India v. Sakharan*⁽¹⁾ is quite in point.

On the plaintiffs' own showing there could not have been any case of trust. His allegation has throughout been that the money was wrongly recovered by the Satara Government.

(1) (1899) 24 Bom. 23.

Property can be said to be vested in another only when some one has an estate in the subject matter of the trust, not merely that he has power to charge it or direct that it should be disposed of. "Vesting" when applied to the subject matter of the property according to its ordinary legal acceptation gives the property in it and not merely control over it.

In the case the property did not become "vested" in the defendant for an express purpose, nor was he entitled to charge it. It is contrary to the ordinary accepted meaning of the term "vested" to say that property is vested in persons by reason merely of their having a control over it.

Secondly, this is not a suit for the purpose of following the trust property, for no such thing as a trust exists in this case, but it is a suit to recover the deposit. If so the decision in *Secretary of State for India v. Sakharam*⁽¹⁾ is in point.

Jayakar with *Gharpure* for the respondents.

SCOTT, C. J.:—It is unnecessary to restate the facts which are not disputed and are very clearly stated by the learned District Judge. He has allowed the plaintiffs' claim for Rs. 1,793 which came into the hands of the East India Company in 1848 when the Satara Principality on the death of the Maharajah Shahaji became part of the Bombay Presidency. The only issues raised in the lower Court were issues of limitation based upon Articles 14 and 120 and section 10 of the Indian Limitation Act. The learned Judge being of opinion that the money was at most held by the defendant on an implied trust held that section 10 of the Indian Limitation Act did not apply to the case and that the plaintiffs' claim could only be decreed on the ground that it was within time under Article 120 of the Indian Limitation Act.

⁽¹⁾ (1899) 24 Bom. 23.

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In our opinion the plaintiffs are entitled to succeed on the ground not only that their claim did not fall within Article 14 and would be within time if it fell within Art. 120 but that it is one to which the bar of limitation cannot be pleaded. It is, we think, correct, as stated by Pigot J. in *The Secretary of State for India in Council v. Guru Proshad Dhur*,⁽¹⁾ that the East India Company could be, and often was, a trustee. It could be expressly a trustee as in the case of the Olive Fund (see *Walsh v. Secretary of State for India*)⁽²⁾ and could be a party to a breach of trust and, therefore, subject to the law of trusts; see *The East India Company v. Robertson*⁽³⁾. That it could incur fiduciary obligations is expressly recognised by the Government of India Act, 1858 (21 & 22 Vict. c. 106) which by section 71 enacts that the Company shall not, after the passing of the Act, be liable in respect of any claim which has arisen out of any fiduciary obligation made before the Act, and by section 42 that all sums of money payable in respect of liabilities then existing, shall be charged upon the revenues of India if such liabilities were lawfully incurred by the Company. By section 65 all persons may have the same remedies, legal and equitable, against the Secretary of State as they could have had against the Company.

From the year 1836 to 1859 the accounts of the Satara Treasury showed the sum now claimed by the plaintiffs as payable to Chinto Mahipat Govaikar, the plaintiff's ancestor. In 1857, it is found by the learned Judge and is not disputed, that the Collector of Satara issued a notice to Chinto's eldest son, Sadashiv, calling upon him to withdraw the amount. In June 1859, Sadashiv petitioned the Collector asking that the money should be paid to him. The sum claimed had, in the previous

⁽¹⁾ (1892) 20 Cal. 51.

⁽²⁾ (1863) 10 H. L. C. 367.

⁽³⁾ (1859) 7 Moo. II. A. 361.

April, been transferred from the suspense to the profit and loss account. The Collector, however, having referred the matter to Government received a reply sanctioning the payment to Sadashiv. Before it was paid, however, Sadashiv's younger brother objected to payment to Sadashiv and asked that it should be distributed among all Chinto's sons. On the 4th of February 1860, the Assistant Collector ordered that the sons and heirs of Chinto in whose names the money had been credited should produce a certificate of heriship and then arrangement would be made to pay them the money. The authority of the Assistant Collector to pass such an order is not disputed.

This order as also the notice to Sadashiv in 1857, was, upon the authority of *Scott v. Bentley*,^(a) a sufficient declaration of trust. The money was certainly vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in name of Chinto was certainly specific.

If the money claimed had been realised in execution proceedings in the Supreme Court and subsequently after many years credited to Government the liability of the Government to repay it could not have been disputed ; see Act XXV of 1866 and Act V of 1870. In our opinion the fact that the liability charged is not specifically recognised by statute, as in the Acts just referred to, does not justify Government in resisting it for the moneys mentioned in those Acts required special treatment as they were held by the Queen's and not the Company's Courts.

We confirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

^(a) (1855) 1 K & J. 281.

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Before Sir Basil Scott, Kt., Chief Justice. and Mr. Justice Batchelor.

April 14.

SULEMAN HAJI USMAN AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. SHAIKH ISMAIL SHAIKH OOSMAN SHANDOLE AND OTHERS,
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 92—Suit regarding public charitable property—Consent by Collector—Conditional consent.

A suit was brought in the name of two plaintiffs for the removal of trustees, for a declaration that the property in the hands of the trustees belonged to the Darga of Pir Saheb and to recover possession of the property. Before the institution of the suit one of the plaintiffs applied to the Collector of the District for permission to file the suit under section 92 of the Civil Procedure Code of 1908. The Collector replied as follows :—"The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant." The trying Court was of opinion that the above certificate was defective in form and therefore dismissed the suit. The plaintiffs having appealed :—

Held, dismissing the appeal, that the Collector had not acted in the manner provided by section 92 of the Civil Procedure Code of 1908. He had not indicated on the proceedings that the suit was filed with his consent and that he had not even come to a conclusion that the suit was one which should have been filed.

The Collector acting under section 93 of the Civil Procedure Code had no right to consent to the institution of a suit by two persons claiming to have an interest in the trust unless it was such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name.

The provisions of section 92 of the Civil Procedure Code must be regarded as imperative.

FIRST appeal from the decision of J. D. Dikshit, District Judge of Thana, in Original Suit No. 10 of 1912.

Suit for a declaration and injunction.

Two plaintiffs Suleman Haji Usman and Jusub Jan

* First Appeal No. 206 of 1913.

Mahomad purporting to be disciples of Pir Maulana Mahomad Sultansaheb Sufinacas Bandi sued for a declaration that all the property moveable and immoveable, received during the life-time of Pir Saheb and afterwards as dedicated to the Darga and now in possession of the defendants, belonged to the Darga and the defendants should be ordered to render an account; that the defendants are unfit to act as trustees; that a perpetual injunction be granted restraining the defendants from receiving the Galla or other moveable property and looking after the management of the immoveable property and staying at the Darga; that the plaintiffs or other persons might be appointed trustees in their place and put in possession of the property; that the plaintiffs have brought this suit after obtaining the consent of the Collector of Thana under section 92 of the Civil Procedure Code.

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The defendants denied that the property in suit belonged to any charitable trust. They managed it as their private family property and the plaintiffs had no right to bring a suit in respect of it.

The District Judge on a preliminary issue: "Is the certificate obtained by the plaintiffs defective in form, and if so, what is the consequence?" found that the consent given in the present case by the Collector was no consent at all as required by section 92 of the Civil Procedure Code and dismissed the suit. His reasons were as follows:—

"In issuing the certificate the Collector says 'the Collector doubts whether section 2, Civil Procedure Code, applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant.' Such a certificate in my opinion is *ultra vires*. If the view of the Collector is correct, then no certificate from him at all would be necessary. It is he who is first to determine whether the particular institution is a public religious trust, whether the applicants are the persons interested and whether

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any breach of the trust has been committed. If he does not satisfy himself on any of these points and wants the Court to determine them, and in the event of the Court finding on these questions in a manner which would justify his issuing the certificate, and gives his consent conditionally on the findings of the Court, the result would be that there is no certificate as required by law before the institution of the suit ; for if the Court finds on merits against the relator's application, then the consent is withdrawn or the right construction of a certificate like the present would be to say that the Collector had not from the beginning given any certificate. It would be open for him to argue that 'I had not given a certificate in the particular case, because I said I would give my consent if the Court holds the allegations of the applicants proved.' The consent of the Collector is to precede the institution of the suit and is not to depend upon the findings of the Court after the institution. If there is no consent before institution the Court cannot proceed with the suit and until it proceeds with the suit and finds on the merits it is not in a position to say whether there will be the consent of the Collector or not. If the Court does not proceed as it should not, it will be never known if the Collector has given the consent. I am of opinion that the consent given in the present case is no consent at all as required by section 92, Civil Procedure Code, even to the one plaintiff and the suit must be dismissed."

Bahadurji with Pandya and Co. for the appellants :—We submit that the certificate was quite legal. It expressly authorised "the filing of a suit to claim any of the reliefs" and as the original application was made with the intention to ask permission to file a suit in the name of applicant himself and the second plaintiff, the certificate should be deemed to authorise both the plaintiffs to file the suit. The very fact that the Collector entertained doubt as to whether section 92 of the Civil Procedure Code would apply to the case shows that he did apply his mind to the matter. The conditional form does not impair the validity of the certificate. It was in the power of the Collector to grant the certificate or to withhold it and he has chosen to grant it. What he meant was that he granted the certificate so far as he himself was concerned, but the Court may or may not grant any reliefs.

I. K. Yadnik for appellant No. 1.

H. C. Coyaji with *S. M. Kaikini* (for *S. S. Patkar*) for respondents Nos. 1 and 2:—We contend that the certificate was bad in law as it did not fulfil the requirements of sections 92 and 93. Sub-section 2 of section 92 shows that section 92 is imperative. According to that the Collector is required to apply his mind to all the points mentioned, namely, whether there is a religious or charitable trust, whether the applicants are interested in it, whether there has been any breach of such a trust, whether the reliefs asked for are proper. See *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishtar*⁽¹⁾; *Ex parte Skinner*⁽²⁾. Here the application was made by the first plaintiff only and the Collector's letter was also addressed to him only. The words of the Collector's reply show that he had not definitely applied his mind to all the points. Further no reliefs are mentioned in the original application and the Collector's words authorise the first plaintiff to ask for "such reliefs as the Court may deem fit to grant" while he ought to specify the reliefs.

Bahadurji in reply.

SCOTT, C. J.:—This was a suit brought in the name of the two plaintiffs, Suleman Haji Usman and Jusub Jan Mahomad, purporting to be disciples of a certain Pir for relief regarding an alleged Darga of the Pir Saheb said to be in the possession of the defendants; for a declaration that the Darga was the owner of all the moveable and immoveable property in the possession of the defendants; that the defendants were unfit to act as trustees; for a perpetual injunction against the defendants; and that the plaintiffs or other persons might be appointed trustees in their place, and put in possession of the property.

Under the authority of a Government Resolution, the Collector of Thana was invested with the powers of

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⁽¹⁾ (1897) 24 Cal. 418 at p. 428.

⁽²⁾ (1817) 2 Mer. 453 at p. 456.

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the Advocate-General under section 539 of the Code of Civil Procedure of 1882, and by virtue of section 157 of the Code of Civil Procedure of 1908, the powers conferred operate under the present Code in respect of sections 91 and 92. We are here concerned with section 92. Sub-section (2) of that section provides that "save as provided by the Religious Endowments Act of 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section." This being a suit in respect of such a trust claiming reliefs specified in sub-section (1) it can only be supported if brought in conformity with the provisions of section 92. It is sought to show that these provisions have been complied with by a communication from the Collector in reply to a petition addressed to him by the 1st plaintiff alone. That petition states that "the petitioner as a member of the Mahomedan community, and especially a disciple of His Holiness Pir Mowlanasaheb wants to file a civil suit against the said heirs according to the Civil Procedure Code, sections 92 and 93. Your Honour's consent is necessary for the institution of the suit. The suit is to be filed in the name of the petitioner and another member of the Mahomedan community and disciple of the Pir Saheb, Jusab Jan Mahomed." The Collector's reply is as follows :—"The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant."

In some High Courts it was considered, until the year 1908, that the provisions of section 539 were permissive and not imperative, but that has never been

the view of this High Court, and the Legislature by the enactment of sub-section (2) of section 92 has made it clear that section 92 must be regarded as imperative.

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The Collector under section 93 stands in the position with regard to his Collectorate of the Advocate-General in the Presidency town, and the suit which requires his consent is a suit which he, if he thought fit, would be competent to file in his own name as a public Officer, whose duty it is to protect public charities as the representative of the Crown in that capacity, and he has no right to consent to the institution of a suit by two persons claiming to have an interest in the trust, unless it is such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name. The duties of the Collector have been described by the Calcutta High Court in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*⁽¹⁾. It is there stated that—

“The Collector is required to exercise his judgment in the matter before giving his consent [to the institution of a suit]. This view is borne out by the observations of Lord Eldon in *Ex parte Skinner*⁽²⁾....The Collector in giving his consent has to exercise his judgment in the matter, and see, not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust.”

The observations of Lord Eldon in *Ex parte Skinner*⁽²⁾ were as follows :—

“It appears to me that such a petition as the present, supposing it to be properly within the scope of the Act of Parliament, can derive no sanction from the signature of the Solicitor-General, he being competent to act as, and in the place of, the Attorney-General, only when there is no such officer as an Attorney-General. The intention of the legislature in framing the Act, was to guard charitable trusts from abuse, and, for that purpose, to prevent such

(1) (1897) 24 Cal. 418 at p. 428.

(2) (1817) 2 Mer. 453 at p. 456.

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proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the Legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information."

We may point out with reference to the powers of the Advocate-General which are vested in the Collector that it is an invariable practice in this Presidency for the Advocate-General, where he does not file the suit himself, to endorse his consent upon the plaint. If the Collector had followed this practice he would perhaps have more clearly realised his responsibilities in the matter. The plaint is, to a certain extent, his plaint as it is launched under his sanction. It should only be such a plaint as he would feel justified in filing himself.

In the present case we agree with the learned District Judge that the Collector has not acted in the manner provided by the section. He has not indicated on the proceedings that the suit is filed with his consent, and in that respect has not followed the practice of the officer whose powers he is to discharge. But more important than that he has not even come to a conclusion that the suit is one which ought to be filed.

He doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector "hereby declares his consent to the filing of the suit to obtain any of the reliefs specified in section 92 which the Court may deem fit to grant;" that is to say, instead of consenting to the institution of a suit for certain definite reliefs, of which he approves, he leaves it to the Court to decide whether such a suit ought to be filed or not. We are of opinion

that he has not discharged the powers conferred upon him as intended by the Legislature, and we, therefore, hold that the suit has not been filed in conformity with the provisions of section 92, and that the learned District Judge was right in dismissing it on that ground.

We are not, however, satisfied that the Judge was justified in awarding two sets of costs to the defendants who had one and the same defence, and his award of costs has not been seriously defended by the learned counsel who appears for the respondents. We affirm the decree and dismiss the appeal with costs. There must be only one set of costs against the plaintiffs throughout.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

1915.

RAMACHANDRA VENKAJI NAIK (ORIGINAL DEFENDANT 7, APPELLANT,
v. KALLO DEVJI DESHPANDE AND OTHERS (ORIGINAL PLAINTIFF AND
DEFENDANTS 1 TO 6 AND 8 TO 11) RESPONDENTS.*

June 21.

*Dekkhān Agriculturists' Relief Act (XVII of 1879), section 13—Mortgage by
Vatandar—Suit for account and redemption—Adverse possession by mort-
gagee—Hereditary Offices Act (Bom. Act III of 1874), section 5—Mesne
profits from the date of suit.*

One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867 mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of section 5 of the Vatan Act, the mortgage became void on the death of

* Second Appeal No. 167 of 1914.

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Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at rupees four hundred a year. This decree was confirmed by the lower appellate Court.

On appeal to the High Court,

Held, that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death namely that of a mortgagee.

Held further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of section 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit.

Janoji v. Janoji ⁽¹⁾ applied.

SECOND appeal against the decision of L. C. Crump, District Judge of Belgaum, confirming the decree of S. R. Koppikar, Subordinate Judge of Gokak.

Suit to redeem.

Plaintiff sued as an agriculturist to redeem and to recover possession of the plaint lands. He alleged that by a deed dated the 15th July 1867 the said lands were mortgaged with possession by deceased Madhavrao Devji Deshpande, the grandfather of the plaintiff and defendants 9 to 11, to deceased Babaji Anant Walvekar, the great-grandfather of defendants 1 to 8 for Rs. 2,366. The defendants 1 to 8 pleaded that the mortgage lands were Deshpandegiri Vatan Inam and the Vatandar-mortgagor Madhavrao having died in 1873, the mort-

gage became void on his death by reason of the provisions of section 5 of the Hereditary Offices Act; that they had been in possession adversely since that date and had become owners by limitation.

The Subordinate Judge held that the possession of the defendants as mortgagee was adverse only to the qualified interest claimed by them and, therefore, the right of the plaintiff to redeem was not barred. His reasons were as follows :—

“It is contended that the mortgage effected by Madhavrao became void on his death, and that the mortgagee's possession became adverse thereafter. The argument would apply only to the Vatan Lands * * *. There is no doubt that had plaintiff or his father chosen to treat the mortgagee as a trespasser on the death of Madhavrao, he could have done so and got back the property free from incumbrance (I. L. R. 5 Bom., 435 and 437). Not having done so plaintiff's right of disputing the mortgage is barred. But his right of redeeming the mortgage cannot be barred unless it is shown that the mortgagee claimed to hold the property as owner more than 12 years before suit. The evidence on the record shows that the mortgagee has always claimed to hold the property as such and not as owner. * * * *. The mortgagee's possession was adverse only to the extent of the qualified interest claimed by them (4 Bombay Law Reporter 465, 5 B. L. R. 186; I. L. R. 18 Bom. 22). As remarked in the case reported in 5 B. L. R. at page 189, there can be no acquisition by adverse possession of an absolute title when it is found that nothing but a limited interest has been asserted. I hold that plaintiff's right of claiming the lands in spite of the mortgage is barred, but that his right of redemption is not barred.

He, therefore, passed a decree in favour of the plaintiff and allowed mesne profits from the date of suit till possession at Rs. 400 a year.

The District Judge confirmed the decree in appeal. The order as to the award of mesne profits was upheld, on the following grounds :—

“The lower Court has awarded mesne profits at Rs. 400 per annum from the date of suit until the date of possession. This order is challenged on the authority of the rulings, viz., (1) *Janaji v. Janaji*, I. L. R. 7 Bom., p. 185. (2) *Mugappa v. Mahamadsaheb*, I. L. R. 34 Bom., page 260.

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These cases are plainly not in point. The principle on which they depend is that the debtor gets a special advantage by the manner in which accounts are taken under the Act and therefore cannot claim also a refund of any surplus due to that system. There is no question here of allowing a refund. The account up to the date of suit shows that the debt is discharged. Probably it has been overpaid. What is thus then to entitle the mortgagee to remain in possession after that date without accounting for profits: Section 13 of the Act lays down how the account is to be taken up to the date of suit and what shall be deemed to be the amount due at that date, *vide* clause 9. It is silent as to profits after that date under the Act: The Code of Civil Procedure applies (section 74). The principle embodied in order XXXIV, rule 9, seems to be applicable. There is no question of refunding money which has come into the mortgagee's hands under the contract. To hold that mesne profits cannot be allowed in such a case leads to a grave hardship. Either the mortgagor is kept out of possession until he can execute this decree and loses the profits unless he files a separate suit, or he is deprived altogether of that to which he is justly entitled. It is further relevant to point out that had the plaintiff sued for redemption under the ordinary law he would plainly have been entitled to the decree which has been passed. Practically he has obtained no benefit from the provisions of the special legislation. He is not bound to avail himself of remedial legislation introduced for his own benefit."

The defendant 7 preferred a second appeal to the High Court.

Nilkant Atmaram and J. G. Rele for the appellants:—We urge two points: first, adverse possession. The property being Vatan, our possession became adverse since the death of Madhavrao, Vatandar-mortgagor, in the year 1873, under section 5 of The Hereditary Offices Act (Bom. Act III of 1874). Since then we continued as trespassers on the property and the mortgagors not having brought a suit to redeem within twelve years from 1873 their right was barred: see *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*⁽¹⁾.

As regards the second point, we contend that the lower Courts erred in passing a decree for 'mesne-profits' from the date of the suit. At the most the Court could grant 'mesne-profits' from the date of the

⁽¹⁾ (1879) 5 Bom. 435.

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decree. 'Mesne-profits,' according to the definition of the term in section 2, clause 11 of the Civil Procedure Code (Act V of 1908), can be allowed when the party is wrongfully in possession of the property until the decree for redemption is passed after taking accounts between the mortgagor and mortgagee. Under the Dekkhan Agriculturists' Relief Act, the duty of taking accounts is cast on the Court according to section 13 of the Act and until that is done the relationship of mortgagor and mortgagee continues to exist. It is determined only when the Court passes the decree: see *Mugappa v. Mahamadsaheb*⁽¹⁾ and *Rangbodha v. Ramchandra*⁽²⁾.

S. R. Bakhle for the respondent:—The Dekkhan Agriculturists' Relief Act comes into force so far the accounts are to be made, but it would not alter the ordinary relationship of parties. It merely provides for the way in which accounts are to be taken and these accounts, as in the case of an ordinary mortgage, have to be made up to the date of the suit. If on taking accounts, it is found that the relationship of mortgagor and mortgagee has already come to an end the provisions of the ordinary law in rule 9, order XXI of the Civil Procedure Code would apply. *Janoji v. Janoji*⁽³⁾ and *Mugappa v. Mahamadsaheb*⁽⁴⁾ are not opposed to this view.

SCOTT, C. J.:—Two points have been argued in this appeal; first, that the mortgagee who is sued for redemption under the Dekkhan Agriculturists' Relief Act in respect of certain Vatan property must be taken to have been in adverse possession, and to have acquired an absolute title by reason of the provisions of section 5 of the Watan Act which render the mortgage invalid

⁽¹⁾ (1909) 34 Bom. 260.

⁽²⁾ S. A. 297 of 1912 (Un. Rep.)

⁽³⁾ (1882) 7 Bom. 185.

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after the death of the original Vatandar-mortgagor. But the Indian Limitation Act cannot be invoked to enforce any such conclusion, for the presumption is that unless there is some definite indication on the part of the person in possession that he will, from a certain date, claim as absolute owner and not as mortgagee, he can only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee. He, therefore, remains a mortgagee for the purpose of the redemption suit, even assuming that he has been in possession for more than twelve years since the death of the original mortgagor.

The second point is that the learned Judge has decreed mesne profits, that is the net receipts, from the property as from the date of suit against the mortgagee. It is to be observed in the first place that no such claim has, so far as the industry of the pleaders has been able to discover, ever been allowed since the passing of the Dekkhan Agriculturists' Relief Act in 1879. If allowed it must be based on the assumption that the mortgagee has, from the date of suit, been in possession of property which he is not entitled to retain in his possession under the contract between the parties, for the Dekkhan Agriculturists' Relief Act itself makes no provision with reference to profits after the date of the institution of the suit. But the plaintiff, by filing a suit under the Dekkhan Agriculturists' Relief Act, and claiming an account on the footing of section 13, which gives the go-by to the provisions of the mortgage contract, renders those provisions irrelevant, and it is, therefore, impossible for the Court to discover whether the mortgagee would, if the contractual relations were preserved, be entitled to remain in possession between the date of suit and the date of the decree. Speaking generally, the enforcement of the pro-

visions of section 13 places the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption arises that the mortgagee is, apart from the provisions of the Dekkhan Agriculturists' Relief Act, not entitled to retain possession after the date of the institution of the suit. It appears to us that this is a case in which we ought to apply the principle laid down by Sir Charles Sargent in *Janoji v. Janoji*⁽¹⁾, in which he says:—

“Remembering that the Act encroaches on existing legal rights, it should, on general principle, not be construed to extend beyond the particular object which the Legislature had in view in passing the Act, and which in the preamble is said in express terms to be to relieve the agriculturist in the Deccan from indebtedness. That object is effected when the agriculturist is enabled to discharge his debt and recover his land on far easier terms than those which he has contracted for.”

We, therefore, vary the decree of lower appellate Court by deleting the provisions with regard to the payment of mesne profits. The appellant has partly succeeded and partly failed; therefore, each party must bear his own costs in this Court and in the lower appellate Court.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

PARVATIBAI BHRATAR SHANKAR PANDHARINATH BAGAT (ORIGINAL DEFENDANT), APPELLANT, *v.* BHAGWANT VISHWANATH PATHAK (ORIGINAL PLAINTIFF), RESPONDENT.*

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(1) (1882) 7 Bom. 185 at pp. 187-188.

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Hindu Law—Ancestral moveable property—Will—Bequest—Bequest by Co-parcener.

One Pandharinath Ramchandra a Hindu testator made a will by which he directed that Rs. 2,001 should be paid to each of his three daughters out of the ancestral moveable property. He died leaving a son surviving him. In a suit by one of the daughters to recover the amount of the legacy from the estate of the testator,

Held, that the legacies were directed to be paid by the testator out of property which he had no power to dispose of by will.

Vitla Butten v. Yamenamma⁽¹⁾ followed. *Hannantapa v. Jirubai*⁽²⁾ and *Bachoo v. Mankorebai*⁽³⁾ distinguished.

SECOND Appeal against the decision of C. Fawcett, District Judge of Poona, confirming the decree passed by V. N. Navaratna, Subordinate Judge of Junnar.

The facts of the case were as follows:—One Pandharinath Ramchandra (defendant's father-in-law) made a will dated the 18th September 1887 by which he appointed four persons as administrators of his estate during the minority of his only son Shankar and directed Rs. 6,001 to be paid to his sister and Rs. 2,001 to each of his three daughters and he further mentioned that the amount directed to be paid to the daughters, should be credited to their respective names in the accounts and they should be paid interest every year at 3 per cent. and that on their attaining majority the administrators should pay the said amount for justifiable purposes. The said Pandharinath died on 18th January 1888 and the persons mentioned in the will were appointed guardians of the estate of the minor Shankar. Later on Shankar died a minor and the defendant succeeded to his estate. Bakubai, one of the daughters of the testator, then made an application to the District Court for a direction to the guardians of the defendant's property to pay her the amount directed to be given to her by the will. The guardians opposed the application. The Court thereupon rejected the application and referred

⁽¹⁾ (1874) 8 Mad. H. C. R. 6. ⁽²⁾ (1900) 24 Bom. 547.

⁽³⁾ (1904) 29 Bom. 51 : (1907) 31 Bom. 373.

the applicant to a regular suit. Bakubai, however, having died the present plaintiff as her heir brought the suit to recover the amount of the legacy.

The defendant contended that the deceased Pandharinath had no power to make a will ; that the will ceased to have any effect on the death of defendant's husband and the defendant succeeded to the property in her own right ; that the will was void and inoperative.

The Subordinate Judge was of opinion that a Hindu father could devise by will property which he would have alienated by way of gift *inter vivos*, and held that there was a valid disposition by way of legacy in favour of the testator's daughter to which the plaintiff could succeed. His reasons were as follows:—

“ A Hindu co-parcener cannot dispose of his share in the undivided family estate by simple voluntary gift or by devise without the consent of the other co-parceners. An exception to this rule is that a father has power to alienate a *reasonable amount* of ancestral moveables as a gift through affection or as pious and reverential gifts (*vide* Phadnis on Hindu Law, page 183). A gift of a few ornaments by the father in favour of his daughter-in-law is valid (I. L. R. 17 Bom. 282). In a family consisting of an uncle and nephew, the uncle made a gift of Rs. 20,000 to his daughter out of the estate worth 10 to 15 lacs and it was held that the gift was binding on the nephew (I. L. R. 29 Bom. 51) * * * . It has been repeatedly held by several High Courts and also by the Privy Council, that the testamentary power may be exercised within the limits which the law prescribes to alienations by gift *inter vivos*, that is to say, the power to make a gift *inter vivos* and the power to devise by will are co-extensive and whatever property can be dealt with as a gift *inter vivos* can be disposed of by will (2 Sutherland 114 at page 123), I. L. R. 22 Mad. 383 ; 14 Bom. L. R., 749 ; Mayne on Hindu Law, 7th edition, page 553.”

The District Judge in appeal confirmed the decision of the Subordinate Judge. He observed that though there was no doubt that Pandharinath had no power to dispose by gift or devise of his general interest in the co-parcenary property, under Mitakshara Law, a father

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can make a gift, within reasonable limits, of a portion of the moveable co-parcenary property for pious purposes or as a gift of affection.

The defendant preferred a second appeal.

Dhurandhar with *K. H. Kelkar* for the appellant :—
The judgments of both the lower Courts are based on the proposition that according to Hindu Law the power of gifts and that of testamentary disposition are co-extensive. A father in a joint family can make a gift of ancestral moveables for certain purposes, therefore, he can also make a bequest of them for those purposes. The proposition, however, is not true in its generality. It has reference to self-acquisitions and not to joint family property. A Hindu co-parcener cannot make a bequest of the joint family property because at his death the right by survivorship is in conflict with the right by bequest, and being prior title, takes precedence: see *Lakshman Dada Naik v. Ramchandra Dada Naik*⁽¹⁾ [Counsel was stopped].

Dewan Bahadur G. S. Rao for the respondent :—
A Hindu father has an independent power of disposal over ancestral moveables for certain specific purposes. *Mita*. Chap. I, section 1, pl. 27. He can, therefore, make a bequest of them for those purposes.

[SCOTT, C. J. :—Is there any case in which it was held that a bequest of co-parcenary property could be made?]

There is no such case. But *Wilkinson J.* in *Rathnam v. Sivasubramania*⁽²⁾ seems to suggest that a Hindu though unseparated can make a bequest of the joint family property for purposes warranted by special texts.

⁽¹⁾ (1880) L. R. 7 I. A. 181 at p. 193. ⁽²⁾ (1892) 16 Mad. 353.

[SCOTT, C. J.—But Muttusami Ayyer J. in that case says that the contention is not tenable inasmuch as a Hindu father has no testamentary power at all either to give legacies or make gifts out of joint property.]

SCOTT, C. J. :—The first question which arises in this case is whether there has been a valid disposition by way of legacy in favour of certain female relations of the testator Pandharinath, for if that point is decided in favour of the appellant, it will dispose of the whole case. The learned Judges both in the Subordinate Court and in the District Court have taken as the fundamental proposition upon which the case must be decided, that whatever property is so completely under the control of the testator that he may give it away in specie during his lifetime, he may also devise by will. That is the form in which the proposition is adopted by the Subordinate Judge. In the District Court the proposition is stated as follows: "A Hindu who is of sound mind, and not a minor, can by gift dispose of all property in which he has an absolute interest and can, by will, dispose of all property which he may give away in his lifetime ;" and it is said that because the author of the Mitakshara states that "it is a settled point, that although property in the paternal or ancestral estate is by birth, the father has independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth," the testator here had power by way of affection to make legacies in favour of his female relations out of what was admittedly ancestral property. There is, so far as we are aware, no decided case in which it has been held that the power of a Hindu father stated in pl. 27, Chap. 1, section 1 of the Mitakshara, above referred to, enables him for the purposes therein mentioned to dispose of ancestral pro-

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perty, even though not immoveable, by will. On the other hand, it has been decided by the Madras High Court, one of the Judges being Mr. Justice Muttusami Ayyar, that a legacy cannot be treated as an executory gift made for religious uses: see *Rathnam v. Sivasubramania*,⁽¹⁾ and that was based upon an earlier decision in *Vitla Butten v. Yamenamma*⁽²⁾, where it was held that a member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death the right by survivorship is in conflict with the right by bequest, and the title by survivorship being the prior title, takes precedence to the exclusion of that by bequest. This point was considered by the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik*⁽³⁾, where it was said: "It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime... and the learned counsel for the appellant have insisted that it follows as a necessary consequence (from the power of alienation by gift *inter vivos*) that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu Law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will." Reference is then made to the case of *Vitla Butten v. Yemenamma*⁽⁴⁾, above referred to, the reason of that decision being stated to be that "the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon

⁽¹⁾ (1892) 16 Mad. 353.⁽²⁾ (1874) 8 Mad. H. C. R. 6.⁽³⁾ (1880) L. R. 7 L. A. 181 at p. 193.⁽⁴⁾ (1874) 8 Mad. H. C. R. 6.

which the will can operate." Their Lordships conclude the discussion of the question in these terms : "The question, therefore, is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision."

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It is admitted by the learned pleader for the respondent that none of the cases referred to by the learned Judge as instances of gifts falling within the power stated in pl. 27, Chap. 1, section 1 of the Mitakshara are cases of testamentary disposition. In *Hanmantapa v. Jivubai*⁽¹⁾, which was referred to by the same learned pleader, the disposition was by gift *inter vivos*, and the decision in *Bachoo v. Mankorebai*⁽²⁾, affirmed in appeal by the Privy Council⁽³⁾, was a case in which the gift had been made before the death of the testator. We are, therefore, of opinion that the decision of the lower appellate Court cannot be supported. The legacies were directed to be paid by the testator out of property which he had no power to dispose of by will. We, therefore, reverse the decree of the lower appellate Court and dismiss the suit. We think that under the circumstances the parties should bear their own costs.

Decree reversed.

J. G. R.

⁽¹⁾ (1900) 24 Bom. 547.

⁽²⁾ (1904) 29 Bom. 51. ⁽³⁾ (1907) 31 Bom. 373.

APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.**June 9.*

THE MUNICIPALITY OF RATNAGIRI (ORIGINAL DEFENDANT), APPELLANTS
v. VASUDEO BALKRISHNA LOTLIKAR (ORIGINAL PLAINTIFF), RES-
 PONDENT.*

*District Municipal Act (Bom. Act III of 1901), sections 2, 46 and 167—
 Dismissal of a Municipal Officer—Suit for damages for wrongful dismissal.*

When a District Municipality exercising the power given to it by the District Municipal Act (Bom. Act III of 1901) or the statutory rules made under the Act, dismisses an officer of the Municipality, that is an act done or purporting to have been done in pursuance of the Act within the meaning of section 167.

APPEAL against the order passed by M. B. Tyabji, District Judge of Ratnagiri, reversing the order made by K. B. Wassoodev, Assistant Judge of Ratnagiri.

Suit for damages.

Plaintiff who was the Municipal Secretary of the Ratnagiri Municipality sued to recover Rs. 1,100 as damages for wrongful dismissal from service. The Municipal administration was the subject of constant complaints from Government Officers and the Government on 10th October 1910 issued the following order: "the Municipality should be asked to dismiss the present Secretary at once." The Collector then forwarded the resolutions to the Municipality on 3rd November 1910. The Municipality, thereupon, called a meeting on 10th November 1910 and unanimously resolved to dismiss the Secretary on that date. The plaintiff was accordingly apprised on the 11th November of the fact of his dismissal and he handed over the charge of his office. Subsequently he applied to the Municipality to reconsider his case as the order of dismissal was illegal inasmuch as it was not in conformity with Rule 103 in which it was enacted that "no officer shall be dis-

* Appeal No. 19 of 1914 from order.

missed without reasonable opportunity being given him of being heard in his defence. Any written defence tendered shall be recorded and a written order shall be passed thereon." On the 20th of July 1912 the Municipality recorded a resolution to the following effect "proper steps be taken and his proposal may then be considered." On the 11th October 1912 after reading the plaintiff's reply the Municipality passed a resolution declining to interfere and confirmed their former resolution of dismissal. The plaintiff alleged that his dismissal really took place on the 11th October 1912 and his suit which was filed on 8th April 1913 was in time according to section 167 of the District Municipal Act (Bom. Act III of 1901).

The defendant Municipality denied the charge of wrongful dismissal and pleaded in defence that the plaintiff's suit was barred by section 167 of the District Municipal Act and Article 2 of Schedule I of the Limitation Act (IX of 1908).

The Assistant Judge held that the act complained of was done in pursuance of the Municipal Act when the Municipality gave orders of dismissal to the plaintiff on the 11th November 1910, and that, therefore, the suit was out of time under section 167 of the Act.

On appeal to the District Judge that decision was reversed and the case was remanded for hearing on merits. Against the order of the District Judge the Municipality appealed to the High Court.

D. A. Khare for the appellant.

G. K. Parekh for the respondent.

SCOTT, C. J.:—This was a suit filed by the plaintiff, who was formerly the Municipal Secretary of the Ratnagiri Municipality, against that Municipality, claiming damages for wrongful dismissal. The learned Assistant Judge held that the suit was barred by limitation under

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the provisions of section 167 of the District Municipal Act. That section provides that :—

“ No suit shall be commenced against any Municipality.....for anything done, or purporting to have been done, in pursuance of this Act, without giving to such Municipality.....one month's previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of.”

The suit was instituted more than six months after the dismissal of the plaintiff by the Municipality, and the question raised in the preliminary issue was whether the dismissal was something done, or purporting to have been done in pursuance of the Act. The learned Assistant Judge held that it was done in pursuance of the Municipal Act, and that, therefore, the suit was out of time.

On appeal to the District Judge that decision was reversed and the case was remanded for hearing on the merits. The learned District Judge said :—

“ I hold that section 167 of the Municipal Act does not cover this case. That section is applicable in cases relating to anything done or purporting to have been done in pursuance of the Act. The test to be applied is not the nature of the suit or the subject matter, but whether the cause of action was or was not connected with the exercise of the statutory powers conferred upon the Municipality. The employment and dismissal of servants are not acts done in pursuance of the Act within the meaning of this section.”

We are unable to agree with that decision. Section 46 of the District Municipal Act (Bom. Act III of 1901) provides that :—

“ Every Municipality shall, as soon as conveniently may be after the constitution thereof, make and may from time to time alter or rescind rules, but not so as to render them inconsistent with this Act.....determining.....the staff of officers and servants to be employed by the Municipality and the respective designations, duties.....&c., of such officers and servants.....and subject to the provisions of section 184, determining the mode and conditions of appointing, punishing or dismissing any such officer or servant.”

Section 2 of the Act provides that all Municipalities constituted and rules made under the repealed District

Municipal Acts of 1873 and 1884 shall, so far as may be, be deemed to have been constituted and made under this Act. Therefore, the rules which were in force at the time of the dismissal, which were rules made under the Act of 1884, must be deemed to have been made in pursuance of the duty cast upon the Municipality under section 46 of the Municipal Act of 1901.

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Now rule 98 of the rules of 1884 provides that "the Municipality alone shall have power to appoint, reduce or dismiss the Municipal Secretary," and certain earlier rules, namely, 77 and following rules, prescribe that the Secretary shall be one of the staff of officers to be employed by the Municipality, and define his duties. The Municipality, therefore, have the power and the duty in a proper case to dismiss the Municipal Secretary. That duty is imposed upon them, and that power is given to them by the Act or the statutory rules deemed to be made under the Act. That being so, when they exercised such power by purporting to dismiss this Secretary, that is, in our opinion, an act done or purporting to have been done in pursuance of the Act within the meaning of section 167. It does not appear to us that the decisions referred to in argument, namely *Myers v. Bradford Corporation*⁽¹⁾ or *Lyles v. Southend-on-Sea Corporation*,⁽²⁾ give us any assistance in the decision of the particular question before us. We, therefore, set aside the order of remand, and restore the decree of dismissal passed by the Assistant Judge with costs throughout.

Order set aside.

J. G. R.

(1) [1915] I. K. B. 417.

(2) [1905] 2 K. B. 1.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Hayward.

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July 15.

NARAYAN VITHAL SAMANT, APPLICANT, v. JANKIBAI KOM SITARAM SAMANT AND OTHERS, OPPONENTS.*

High Courts Act (24 & 25 Victoria, chapter 104), sections 2, 9 and 13—Amended Letters Patent, clauses 11 and 26—High Court Rules, Original Side, Rule 62†—High Court Rules, Appellate Side Rules 1 and 5—Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.

It is not competent to a single Judge of the Bombay High Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorised so to do by rules.

Per MACLEOD J.—A single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Sub-Judge's Court in the mofussil, and so in effect stay the proceedings.

THIS was an application for transfer of a suit pending on the Original Side of the Bombay High Court to the Court of the First Class Subordinate Judge at Ratnagiri.

The applicant's brother Sitaram deposited in 1901 a sum of Rs. 8,000 with opponents Nos. 3 and 4; and a sum of Rs. 1,400 with opponent No. 5 at Malwan. Before starting on a pilgrimage Sitaram made a will in 1902, whereby he bequeathed his property to his

* Civil Application No. 55 of 1915.

† The rule runs as follows :—

RULE 62.—Any Judge of the High Court may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court on its Original Side.

nephews, Vithal and Balkrishna (son of applicant) ; allowed a definite amount of maintenance to his wife Jankibai (opponent No. 1) ; and appointed opponents Nos. 3 to 6 as executors of the will. Sitaram was not heard of since he went on the pilgrimage.

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On the 17th January 1913, opponent No. 1, through her constituted attorney opponent No. 2, took out letters of administration to the estate of Sitaram.

Opponent No. 3 filed an interpleader suit in the Court of the First Class Subordinate Judge at Ratnagiri, against the petitioner and the opponents. Shortly afterwards, opponents Nos. 1 and 2 filed Suit No. 246 of 1913 on the Original Side of the Bombay High Court against opponents Nos. 3 and 4 to recover Rs. 14,940 odd. This was followed by two more suits. One of them, Suit No. 319 of 1913, was instituted by the applicant against the opponents, in the Court of the First Class Subordinate Judge at Ratnagiri, to establish his claim to the property left by Sitaram. The applicant's son Balkrishna brought another suit (No. 321 of 1913) in the same Court, to establish his right under Sitaram's will.

On the 4th September 1914, opponents Nos. 1 and 2 compromised the claim in the High Court suit with opponent No. 3 at Rs. 10,000. The interpleader suit was consequently dismissed.

The opponents Nos. 1 and 2 next applied, on the 9th October 1914, on the Appellate Side of the Bombay High Court, for transferring Ratnagiri Suits Nos. 319 and 321 of 1913 to the Original Side of the High Court. This application was rejected.

On the 14th November 1914, opponents Nos. 1 and 2 applied to the High Court to make the applicant and opponents Nos. 5 to 9 as party defendants to the High

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Court Suit No. 246 of 1913. The application was granted. Opponents Nos. 1 and 2 next obtained a rule against the applicant and others calling upon them to show cause why the Ratnagiri suits should not be stayed pending the disposal of the High Court suit. This rule was made absolute on the 21st December 1914.

The applicant filed the present application on the Appellate Side of the Bombay High Court, on the 25th January 1915, praying "that the Suit No. 246 of 1913 filed on the Original Side of the High Court be transferred to the file of the First Class Subordinate Judge's Court at Ratnagiri and consolidated with two Suits Nos. 319 of 1913 and 321 of 1913 now pending in that Court."

The application was heard by Scott C. J. and Batchelor J. when their Lordships referred the following question to a Full Bench:—

"Whether it is competent to a single Judge of this Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil unless authorized so to do by rule?"

The referring judgment was as follows:—

SCOTT, C. J.:—The applicants pray that a suit instituted and now partly tried on the Original Side of the High Court may be removed for trial to the Court of the Subordinate Judge of Ratnagiri along with certain other suits now depending between parties to the Original Side suit in the Court at Ratnagiri.

The reason of the application which is of a very unusual nature rests upon the necessity to which the applicants in Ratnagiri have been reduced by an order in the Original Side suit passed by a single Judge staying the suits in the Ratnagiri Court.

It is contended by the applicants that the order was *ultra vires* and should be disregarded and a decision to that effect would satisfy them as it would enable them to proceed with their suits.

It is clear beyond argument that the High Court can stay the hearing of a suit in a Subordinate Court, but the question is whether any Judge sitting alone is entitled thus to exercise the functions of the High Court in its Appellate Jurisdiction.

The High Court is established by Royal Letters Patent under 24 & 25 Vict., Ch. 104. Section 2 of that Statute provides that the High Courts respectively shall consist of a Chief Justice and a limited number of Judges. Under section 9 each High Court is to have and exercise such jurisdiction as the Crown by Letters Patent may grant and direct and, unless otherwise directed, all jurisdiction and power and authority of the old Supreme and Sudder Courts.

The only provision for delegation by the High Court of the exercise of its Original and Appellate Jurisdictions by one or more Judges or Benches of Judges is contained in section 13.

Such delegation is to be effected by rule.

Where the rule empowers a single Judge or a Bench of two Judges to exercise any of the jurisdictions of the High Court such Judge and Judges become the Committees of the High Court to the extent to which the rule empowers him or them to act.

In accordance with the statutory authority the High Court has since long provided for the exercise of jurisdiction by such Committees.

Rule 1, Chapter I of the Appellate Side Rules, says :—
“ The Civil and Criminal Jurisdiction of the Court on the Appellate Side shall, except in cases where it is

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otherwise provided for by these rules or ordered by the Chief Justice, be exercised by a Division Court consisting of two Judges."

Rules 2 and 3 enumerate the Appellate Side matters which may be disposed of by a single Judge.

Rule 5 states that applications for the transfer of suits from Civil Courts in the mofussil to the High Court under section 24 of the Civil Procedure Code shall be made to, and disposed of by, a Division Court of two Judges and when the application is granted the record and proceedings shall be sent to the Original Side where the suit will be tried.

It is noteworthy that such an application was made to a Division Bench of the Appellate Side by the present opponents for the transfer of the Ratnagiri suits under section 24 but it was rejected and after such rejection a single Judge of the Original Side passed an order staying the further hearing of the suits.

It is, we think, clear that such an order appertains to the Appellate, and not to the Original Jurisdiction of the High Court; and the contention that this jurisdiction may be exercised by a single Judge charged with the exercise of Original Jurisdiction, appears to us to be exposed to doubt. The only cited authority in favour of this contention is to be found in the judgment of Phear J. in *The Queen v. Ameer Khan*⁽¹⁾, where that learned Judge held that a single Judge, sitting on the Original Side of the Court, had power to entertain an application for the removal of a criminal case from a mofussil Court to the High Court in the exercise of the latter Court's Extraordinary Original Criminal Jurisdiction. It is true that this judgment was referred to with approval by Batty J. in a criminal case (*Emperor v. Robert Comley*⁽²⁾) which came up to this High Court from

⁽¹⁾ (1871) 7 Ben. L. R. 240.

⁽²⁾ (1904) 29 Boml. 575.

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Aden, but the reference was made in apparent ignorance of Rule 6 of the Appellate Side Rules which provides that applications for the withdrawal of a criminal case to the High Court for trial shall be made to, and disposed of by, the Division Court to which Criminal Appellate business is allotted. And, in considering the effect of such a rule upon the present question, we have to reckon with the view taken by a Judge of this Court in *Maganlal v. The Bombay Co. Ltd.*⁽¹⁾, where Tyabji J. held that a single Judge's power to exercise the functions of the High Court was limited to the cases where, by the Rules of the High Court, the exercise of such functions was entrusted to the single Judge. If this view is sound, it suggests further that the true principle is that the jurisdiction of the High Court is properly exercisable by the High Court alone, as a body, except in so far as the exercise of such jurisdiction has been committed by lawful delegation to some, or to one, of the Judges composing the Court.

But as the matter is of considerable practical importance and appears to be involved in much uncertainty of judicial opinion, we think it desirable that a reference should be made to a Full Bench. The question referred will be whether it is competent to a single Judge of this Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil unless authorised so to do by rule.

On the 2nd July 1914, the reference was heard by Scott C. J. and Batchelor, Macleod, Shah and Hayward, JJ.

Coyaji, with *A. G. Desai*, and *Hiralal & Co.*, for the applicant.

(1) (1904) 7 Bom. L. R. 143.

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Kanga and Mulla, with *Ardeshir Hormasji, Dinshaw & Co.*, for opponent No. 2.

P. B. Shingne, for opponent No. 3.

K. N. Koyaji, for opponent No. 5.

Coyaji.—We submit that the answer to the question referred must be in the negative.

Section 9 of the Charter Act (24 &c. 25 Vic. c., 104) enacts that the High Court is to have and exercise all such jurisdiction as the Crown by Letters Patent may grant and direct. Section 13 enacts that the exercise by one or more Judges, of the original or appellate jurisdiction of the High Court is to be governed by rules to be made by the High Court. The Amended Letters Patent, clauses 12 to 16 grant and declare the powers which the 'High Court' is to exercise. Clause 36 declares the powers of single Judges and Division Courts; and appears under the heading of "Powers of single Judges and Division Courts." The result of reading clause 36 of the Amended Letters Patent with sections 9 and 13 of the Charter Act is that the jurisdiction of the High Court is properly exercisable by the High Court alone as a body, except in so far as the exercise of such jurisdiction is lawfully delegated to some or to one of the Judges composing the Court. Where the Judges of whom the High Court is composed are numerous, it is obvious that there should be a division of the functions which the High Court is established to perform. Such division of functions is provided for under section 13 of the Charter Act and clause 36 of the Amended Letters Patent. But no Bench can assume the performance of functions not assigned to it, or assume performance of functions expressly assigned to another Bench.

[BATCHELOR, J.:—Clause 36 declares: "Any function which is hereby directed to be performed by the said

High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction, may be performed by any Judge or any Division Court thereof, appointed or constituted for such purpose..."]

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The reference is to sections 13 and 14 of the Charter Act.

Our High Court has framed rules for the exercise of the power of removal of suits from mofussil Courts. See Rules 1 and 5* of the Appellate Side Rules; and Rule 28† of the Original Side Rules. Under these Rules, an application for transfer of suit from the mofussil Court to the High Court must first be made to the Division Bench on the Appellate Side; and when an order is made, the papers in such suit are finally forwarded to the original side of the High Court.

The function in question here is the directing a mofussil Court to stay a suit pending before it. The Rules clearly say to whom this function is assigned. A single Judge sitting on the Original Side is not appointed or constituted for this purpose (clause 36).

The view that a single Judge's power to exercise the functions of the High Court is limited to the cases

* RULE 1.—The Civil and Criminal Jurisdiction of the Court on the Appellate Side shall, except in cases where it is otherwise provided for by these rules or ordered by the Chief Justice, be exercised by a Division Court consisting of two Judges.

RULE 5.—Applications for the transfer of suits from Civil Courts in the mofussil to the High Court under section 24 shall be made to, and disposed of by, a Division Court. When the application is granted, the record and proceedings shall be sent to the Original Side, where the suit will be tried.

† RULE 28.—When an order is made by the High Court, Appellate Side, under the Extraordinary Civil Jurisdiction for the removal of a suit from any Subordinate Court, the Registrar, High Court, Appellate Side, shall transfer the papers in such suit when received, to the Prothonotary, who shall treat the suit as a suit filed on the Original Side.

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where by the Rules the exercise of such functions was entrusted to a single Judge seems to have always been adopted by our High Court. There is no decided case expressly on this point; but there are expressions of opinion by different Judges which strengthen my contention.

In *Achratlal Girdharlal v. The Guzerat Spinning and Weaving Company Limited*⁽¹⁾, an application was made for the transfer of a suit from the file of the First Class Subordinate Judge of Ahmedabad to the High Court. Their Lordships there said: "An application, such as this is, for the transfer of a suit from a Mofussil Court may be regarded as one made to this Court in its original jurisdiction, and according to sections 13 and 14 of the High Court's Act (24 & 25 Vic. c., 104) and the Rule, Chapter II, section 4††, of those made under the statute, should be dealt with by either a single Judge or a Division Court constituted according to the determination of the Chief Justice as to the class of cases to be taken up by each Judge either singly or in a Division Court. In the present instance there had been no express determination by the Chief Justice that the Judges of this Division Court should be a Division Court for the purpose of exercising the branch of the original jurisdiction which consists in dealing with applications for the transfer of original suits; but he has now, on the matter being brought to his notice, constituted us a Court for this purpose. Any question as to jurisdiction is thereby prevented." If a single Judge or a Division Court is the same as the High Court and can assume jurisdiction without the aid of Rules, then there was no meaning in the objection

(1) (1879) P. J., 29.

†† SECTION 4.—The Original Civil Jurisdiction of this Court, ordinary and extraordinary, shall be exercised by one or more Judges sitting separately, or by Division Court, constituted by two or more Judges.

raised by counsel and no necessity for the reference by their Lordships to the Rules.

In *Pirbhai Khimji v. B. B. & C. I. Rail. Co.*⁽¹⁾, Green J. sitting on the Original Side directed a case there pending in the Bombay Court of Small Causes to be removed in the High Court. This particular question (*viz.*, as to the power of a single Judge) was not raised there; but the only question discussed was whether the High Court had superintendence over the Bombay Court of Small Causes.

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In *Jairamdas v. Zamenlal*⁽²⁾, Russell J. expressed a doubt as to whether a single Judge on the Original Side could entertain an application for transfer of a suit from the Bombay Court of Small Causes to the High Court. Mr. Justice Tyabji in *Maganlal v. Bombay Co. Ltd.*⁽³⁾ expressed himself clearly on the point and ordered a transfer.

It is true that in *Emperor v. Robert Comley*⁽⁴⁾, Batty J. has observed that a single Judge of the Bombay High Court could direct transfer of a criminal case from Aden to the High Court. Rule 6§ of the Appellate Side Rules does not seem to have been brought to the notice of the Judge. He simply relied on *The Queen v. Ameer Khan*⁽⁵⁾. In the Calcutta case, no reference is made to clause 36 of the Amended Letters Patent: but the learned Judge follows the existing practice of the Court (pp. 248, 249).

(1) (1871) 8 Bom. H. C. R. (O. C. J.). 59.

(2) (1903) 5 Bom. L. R. 201.

(3) (1904) 7 Bom. L. R. 143.

(4) (1904) 29 Bom. 575.

(5) (1871) 7 Ben. L. R. 240.

§ RULE 6.—Applications under section 526, Criminal Procedure Code, or the Letters Patent for the withdrawal of a case to the High Court for trial shall be made to, and disposed of by, the Division Court to which the criminal business is allotted, and that Court shall also, if it thinks fit, make the direction contemplated in section 267 of the said Code.

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Where under the Rules made under the Charter Act, particular functions are assigned to particular Divisions, all matters relating to such functions belong exclusively to such particular Divisions. What the Rules do is to divide the functions. A particular Bench takes cognizance of all matters falling within that function. The Rules do not take away any power or jurisdiction. But the exercise of that power or functions should be exclusive. Within the exercise of these particular functions, the Judge does exercise the plenary powers of the High Court. It is confusion of thought to say that this leads to the diminution of jurisdiction exercised by any other Bench of the Court.

Arguing by analogy, take the case of the Supreme Court of Judicature in England. Prior to the Judicature Act of 1873 there were different Courts exercising different functions. All these Courts were, by the Judicature Court, united and consolidated together as one Supreme Court. Notwithstanding such amalgamation and consolidation, opinion still exists that the Probate Division is exclusively seized of the power of granting and revoking probates: see Williams on Executors, p. 210.

* *Kanga*.—Our submission is that the question referred must be answered in the affirmative.

Every Judge of the High Court has jurisdiction to exercise the full powers of the High Court and the Rules framed by the High Court apportioning the business cannot take away such a power. Further, each Judge of the High Court is the High Court and has jurisdiction to exercise the full powers of the High Court unless limited by Rules. Again, if there are no Rules it cannot be said that an order for stay appertains to the appellate jurisdiction. In the absence of any Rule it does appertain to the High Court which may

mean any Judge or the full Court, that is, all the Judges of the High Court.

There are no Rules framed by the High Court as regards staying of suits in the mofussil Courts. It cannot, therefore, be contended that the order for stay of such suits appertains to the appellate jurisdiction. The order for stay appertains to the full Court : all the Judges together can alone stay the suit in absence of Rules.

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First, then, each Judge has jurisdiction to exercise all the powers of the High Court ; and any order which the High Court can pass, can be passed also by any Judge of the High Court. Section 2 of the Charter Act deals with constitution of the High Court ; and enacts that it shall consist of the Chief Justice and a certain number of Judges. Section 9 refers to jurisdiction and powers of the High Court : it vests every jurisdiction in the High Court ; and it invests the High Court with the jurisdiction and powers exercised by the Supreme Court. Every Judge of the Supreme Court had the power to exercise all the powers of the Supreme Court : for it is expressly ordained in the Supreme Court Charter :—" And we do further will and ordain, that all the Judgments, Rules, Orders, and Acts of authority or power whatsoever, to be made or done by the said Supreme Court of Judicature at Bombay, shall be made or done by and with the concurrence of the said three Judges, or so many or such one of them as shall be on such occasions respectively, assembled or sitting as a Court, or of the major part of them so assembled and sitting. " Thus, the judgment of the single Judge is the judgment of the High Court : and the order that each Judge passes is the order of the High Court.

Section 13 deals with the mode of the exercise of the Original and Appellate Jurisdiction by the High Court :

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that is, the High Court may, by its Rules, provide for the exercise of the Original and Appellate Jurisdiction vested in the High Court. This section does not take away the jurisdiction conferred by section 9. It cannot also be taken away by the Rules framed by the High Court. They are only meant for administrative convenience. The object of the Rules is not to make several Judges with limited jurisdiction ; but to ensure expeditious and effective despatch of judicial business.

It is not correct to say that by Rule you can make each Judge a High Court ; and that without the Rules each Judge is not a High Court. If the argument of the other side is correct, it would come to this, that the effect of the Rules is to confer on each particular Bench of the High Court a portion of the jurisdiction of the High Court. The High Court rarely acts as a whole. If then the High Court means all the Judges put together the result is that we have a group of Courts of imperfect limited jurisdiction.

The intention of the legislature seems to be that each Judge has jurisdiction to exercise all the powers of the High Court. The mode in which those powers are exercised is shown by Rules. Otherwise, there is no meaning in the last words of section 13. The Rules cannot limit the jurisdiction which is conferred by the Crown on the High Court. The judicial validity of acts done by each Judge, if *bona fide*, cannot depend upon whether the particular matter lies within the limits of that Judge by rule of apportionment.

Clause 36 of the Amended Letters Patent is only an enabling section. It does not confer or take away jurisdiction. The first part of the clause seems to be a preliminary to the second part.

[SCOTT, C. J. :—If you look at the Original Letters Patent, you will find that the second portion of the clause has been subsequently added.]

In *Achratlal Girdharlal v. The Guzerat Spinning and Weaving Company Limited*⁽¹⁾, the application was heard by a Special Bench appointed by the Chief Justice. In *Pirbhai Khimji v. B. B. & C. I. Rail. Co.*⁽²⁾, the transfer of suit applied for was from the Presidency Court of Small Causes to the Bombay High Court. The decision in *Jairamdas v. Zamenlal*⁽³⁾ has been dissented from by the Calcutta High Court in *Rash Behary Dey v. Bhowani Churn Bhose*⁽⁴⁾ and *Mungle Chand v. Gopal Ram*⁽⁵⁾. In *Geffert v. Ruckchand Mohla*⁽⁶⁾, an application was made to a single Judge on the Original Side for having a suit filed in the High Court stayed and the plaint returned for prosecution to the mofussil Court.

Secondly, we submit that each Judge of the High Court is the High Court, and can exercise the functions of the High Court unless limited by Rules. In the absence of any limitation by Rules what is there to prevent each Judge from acting as the High Court. When there are no Rules clause 36 of the Amended Letters Patent will not apply. If there are no Rules made under clause 13 does it follow that the Original and Appellate Jurisdiction is to be exercised by the Full Court ?

[SCOTT, C. J. :—Jurisdiction in the abstract is divided broadly into Original and Appellate. If the Original Jurisdiction is defined expressly, the rest is Appellate Jurisdiction.]

(1) (1879) P. J. 29.

(2) (1871) 8 Bom. H. C. R. (O. C. J.) 59.

(3) (1903) 5 Bom. L. R. 201.

(4) (1906) 34 Cal. 97.

(5) (1906) 34 Cal. 101.

(6) (1888) 13 Bom. 178.

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The division of Jurisdiction into Original and Appellate is not exhaustive : and it does not necessarily follow that everything that cannot be taken up on the Original Side can be taken up on the Appellate Side. If the Original Jurisdiction is to be confined to what is expressly mentioned, how can a Judge sitting on the Original Side take cognizance of the Lunacy and other proceedings ?

The power of staying suits is given neither by the Charter Act nor by the Letters Patent. It is the inherent jurisdiction of the High Court. Under section 151 of the Civil Procedure Code each Judge of the High Court will have the whole of the powers of the High Court. Section 13 of the Charter Act provides for "the exercise of jurisdiction." Civil Procedure Code, section 115, shows that "exercise of jurisdiction" is not the same as "jurisdiction." There is a distinction between want of jurisdiction and irregular exercise of jurisdiction. In the present case all that can be said at the most is that the single Judge has exercised his jurisdiction with irregularity, only if there is a rule to that effect.

Logically, if each Judge is not the High Court and if each Judge has a portion of the Jurisdiction of the High Court conferred on him by Rules, then it follows that each Appeal Court also has a portion of the Jurisdiction conferred on it and hence in the absence of Rules an order for stay or transfer or other acts of similar nature should be by the Full Court, that is, all the Judges.

In England, notwithstanding the division of several Jurisdictions of the High Court, there are cases to show that if an admiralty suit is filed after the Judicature Act in the King's Bench Division, that Court has jurisdiction to try the suit : *The Gertrude*⁽¹⁾.

(1) (1888) 13 P. D. 105.

Coyaji, in reply :—Looking to all the provisions of the Amended Letters Patent, it appears the powers are all conferred on the High Court. Clause 40 differentiates between High Court and single Judges of the High Court.

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There are no Rules for staying suits pending in the mofussil Courts. Rule 1 of the Appellate Side Rules is sufficiently comprehensive to include such a power. The phrase "Appellate Jurisdiction" in the Charter Act and the Letters Patent is not strictly confined to Appellate Side matters ; it includes powers of revision : see *Abdul Karim v. Municipal Officer, Aden*⁽¹⁾. In the absence of Rules, the power of staying suits would rest with the whole High Court. It cannot rest with a single Judge. If such Judge attempted to exercise it, it would be beyond his powers.

Section 151 of the Civil Procedure Code is a comprehensive section, which declares jurisdiction not only in the High Court, but all Courts.

The two Calcutta cases referred to are clearly distinguishable. The Judges in those cases were exercising personal jurisdiction on the parties before them.

Where a single Judge stays a suit pending in the mofussil Court, he is really exercising jurisdiction on the mofussil Court.

Kanga referred to *Hiralal v. Bai Asi*⁽²⁾.

C. A. V.

BATCHELOR, J.:—The question referred to the Full Bench should, in my opinion, be answered in the negative.

The jurisdiction of this Court, and of the Judges composing the Court, is determined by the Statute 24 & 25

⁽¹⁾ (1903) 27 Bom. 575.

⁽²⁾ (1897) 22 Bom. 891.

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Vic., c. 104, by the Letters Patent issued thereunder and by the Rules framed by the Court under the authority conferred by section 13 of the Act. By section 9 of the Act, it is provided that the Court shall have and exercise all such jurisdiction as Her Majesty may by Letters Patent grant and direct. Primarily, therefore, it is upon the Court that the jurisdiction is conferred, and section 2 of the Act provides that the Court shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may appoint. Section 13 empowers the Court by its own Rules to "provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges...of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice." In the exercise of this power this Court has made Rules for the exercise of jurisdiction by the Judges both on the Original and the Appellate Side.

The intent and effect of these provisions seem to me to be that the jurisdiction conferred is conferred on the Court as a body: it is the Court which is to "have and exercise" the jurisdiction granted: but, inasmuch as it would not be "convenient for the due administration of justice" that the entire Court should have to sit for the valid determination of every suit and appeal and application, power is given to the Court to make Rules for the exercise of the Court's jurisdiction by one or more Judges within the limits and subject to the conditions prescribed by the Rules. The powers so delegated would thus fix the limit within which such Judge or Judges would be competent to exercise the Court's jurisdiction, and any order made by a Judge or Judges in excess of this authority would be void as being beyond the jurisdiction which the Judge or Judges were legally authorised to exercise.

Now the particular order with which we are here concerned is an order made by a single Judge, sitting in the exercise of the Court's Ordinary Original Civil Jurisdiction, for the stay of a suit pending in the Court of the Subordinate Judge of Ratnagiri. But, by clauses 11 and 36 of the Letters Patent and Rule 62 of the Original Side Rules of this Court, the local jurisdiction of the learned Judge was confined to the Town and Island of Bombay. It is clear, therefore, and it was scarcely contested in argument, that the order under discussion appertains to the Appellate Side of the Court. The same result would follow if the order could properly be attributed to this Court's general powers of superintendence conferred by section 15 of the Act, for under that section, the powers granted are powers of superintendence over all Courts subject to this Court's Appellate Jurisdiction. This being so, the case falls under Rule 1 of the Appellate Side Rules, which provides that, with certain exceptions not now material, the civil jurisdiction of the Court on the Appellate Side shall be exercised by a Division Court consisting of two Judges. It follows, therefore, that the order now in question was made by the learned Judge in excess of the jurisdiction which he was legally empowered to exercise.

If that be so, it seems to me unarguable that the Judge acquired jurisdiction by the mere circumstance that the order was passed on an application made in a suit which the Judge had jurisdiction to try. And as to the contention that substantially the same result could have been secured by an order *in personam* restraining some of the parties from proceeding with the Ratnagiri suit, and that an order of this nature would have been within the Judge's competence, it is enough to say that that is not the order which was made, or which arises for consideration on the question submitted to this Bench. I think, therefore, that we should refrain from

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expressing any opinion as to the validity which might attach to any such order *in personam*, and should content ourselves with returning a negative answer to the question referred to us.

SCOTT, C. J.:—I agree.

SHAH, J.:—I agree.

HAYWARD, J.:—I agree.

MACLEOD, J.:—The applicants presented a petition to a Division Bench on the Appellate Side of the High Court praying that a Suit 246 of 1913 instituted and then partly tried on the Original Side of the High Court might be (1) removed for trial to the Court of the First Class Subordinate Judge of Ratnagiri, and (2) consolidated with two suits pending in that Court.

A preliminary objection to the granting of the latter prayer was constituted by the fact that an order had been made on the 21st December 1914 in Suit 246 of 1913 whereby the proceedings in the two suits in the Ratnagiri Court had been stayed. The applicants contended that this order was *ultra vires* and could, therefore, be disregarded. If they obtained a decision to that effect they could proceed with their suits.

The question, therefore, arose whether the Judge had jurisdiction to make the order of the 21st December 1914. The Division Bench being of opinion that the authorities on the point were conflicting referred the following question to a Full Bench :—

“Whether it is competent to a single Judge of this Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge’s Court in the mofussil, unless authorised so to do by rule.”

I should like to point out that the question seems to arise not on the application for a transfer of the High Court suit to the Subordinate Judge’s Court, for if that

application were granted the suit would be transferred and all interlocutory orders made in the suit would go with it, but on the application for a consolidation of the suit, when transferred, with other suits pending in the same Subordinate Judge's Court, since if the Subordinate Judge could not proceed with these suits, it would be of little use consolidating another suit with them.

There is no provision in the Civil Procedure Code for the consolidation of suits, but a Court has inherent jurisdiction under section 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a District Court and the case is still stronger when the suits are pending in different Courts.

The applicants have really adopted this novel procedure in order to get rid of the order of the 21st December 1914 and I venture to submit that on the facts before us anything that we may say regarding the jurisdiction of the Judge to make that order will be *obiter*.

However this point was not taken by the opponents' counsel in his argument and I therefore proceed to deal with the question referred to us on its merits.

I have had the advantage of reading the judgment of my brother Batchelor and while I am in accord with the greater part of it it seems to assume that the order in question was a prohibition, nor can I agree that the question is so concise and free from ambiguity as to admit of a direct answer. For the question may refer to three possible orders which a Judge might make.

A Judge sitting on the Original Side might make an order for a stay of proceedings at the instance of a party to a suit in a Subordinate Judge's Court. It is beyond controversy that such an order would be without jurisdiction.

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Secondly, a Judge at the instance of a party in a suit pending before him might issue a prohibition to a Subordinate Judge against proceeding with a suit between the same parties.

Such an order would clearly be without jurisdiction.

Thirdly, a Judge might restrain the parties in a suit pending before him from proceeding with a suit in a Subordinate Judge's Court in the mofussil. Such an order would, in my opinion, be with jurisdiction under section 151 of the Code.

In *Mungle Chand v. Gopal Ram* ⁽¹⁾ under the Code of 1882, Sale J. went so far as to restrain the parties in a suit before him from proceeding with a suit pending in the Court at Bareilly, but his attention does not seem to have been drawn to the provisions of section 56 of the Specific Relief Act.

An order *in personam* to stay proceedings is, in effect, an injunction for though it may be desirable it is not always necessary that an order, which prevents the parties from doing certain acts, should contain the words 'enjoin' or 'restrain.' For instance, an order appointing a Receiver of certain property is also an injunction restraining the parties from dealing with that property. Nor is an order *in personam* limited to the act of the parties within the local limits of the Ordinary Original Civil Jurisdiction of the High Court except by express enactment.

In my opinion, therefore, a single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the mofussil, and so in effect stay the proceedings.

R. R.

PRIVY COUNCIL.*

SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT,
v. BAI RAJBAI (PLAINTIFF) AND CROSS APPEALS.

[On appeal from the High Court of Judicature at Bombay.]

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April 16, 20,
21, 22, 23.
June 3.

Kasbatis—History and status of Kasbatis in Gujerat—Ahmedabad Taluqdars' Act (Bombay Act VI of 1862)—Gujerat Taluqdars' Act (Bombay Act VI of 1888)—Bombay Land Revenue Code (Bombay Act V of 1879), sections 68, 73—Rights of Kasbatis after cession to and annexation by British Government—Rights of Lessees from Bombay Government—Onus of proof on claimant of rights of permanent tenure—Lease implies no obligation to renew at end of term—Obligation to give up possession at end of lease.

In this case their Lordships of the Judicial Committee held (reversing the judgments of the Courts below) that the respondent, the descendant of a family of Kasbatis who were in possession of a village called Charodi in the district of Ahmedabad in Gujerat at the date of the cession of that district by the Peishwa to the British Government, and whose predecessors-in-title held thereafter under leases from the Government, were mere lessees of the Government of Bombay, bound to give up, at the end of each term of lease, possession of the village, and were never legally entitled as each lease terminated to have a new lease granted to the last lessee or representative, and therefore never acquired permanent possession of the village.

The only legal enforceable right the Kasbatis could have as against the British Government were those, and those only, which that Government by agreement, express or implied, or by legislation chose to confer upon them. The relation in which they stood to their native sovereign, and the consideration of the existence, nature, and extent of their rights before the cession were only relevant matters for the purpose of determining whether and to what extent the British Sovereign had recognized their ante-cession rights, and had elected or agreed to be bound by them. The burden of proving that they had any such rights which the Bombay Government consented to their continuing to enjoy rested upon the respondent.

The principle laid down in *The Secretary of State in Council of India v. Kamachee Boye Sahaba* ⁽¹⁾ and *Cook v. Sprigg* ⁽²⁾, followed.

° *Present* :—Lord Atkinson, Sir George Farwell, Sir John Edge and Mr. Amir Ali.

⁽¹⁾ (1859) 7 Moo. I. A. 476.

⁽²⁾ [1899] A. C. 572.

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The just and reasonable inferences to be drawn from the evidence were that the respondent had failed to discharge the onus on her ; that the Bombay Government had never by agreement express or implied conferred upon her or any of her ancestors the proprietary rights in, or ownership of, the village claimed by her ; they never conferred upon any of the lessees of the village a legal right to insist, at the termination of the lease, upon a new lease being granted ; they were never under a legal obligation to grant any lease of the village, and the granting or withholding of a lease rested solely in their discretion.

The mere repetition of acts of grace by the Government could not *per se* create a legal right to their continuance.

Prima facie a lease for a term does not import any right to a renewal of it : on the contrary it *prima facie* implies that the lessees' right to the premises ends with the term.

There was no analogy between holdings of the Grassias and the Kasbatis ; they and the Mewassies were clearly distinguishable from the Kasbatis. The Ahmedabad Taluqdars Act (Bombay Act VI of 1862) did not apply to Kasbati lessees. They never were Ahmedabad Taluqdars in the true sense : they did not lose their ancient rights of ownership of land by taking leases as did the Grassias and therefore did not suffer the injustice which the statute was designed to remedy.

The effect of sections 68 and 73 of the Bombay Land Revenue Code (Bombay Act V of 1879) read with the Gujerat Taluqdars' Act (Bombay Act VI of 1888) is that a lessee whether a true Taluqdar, or a Thakur, Mewassie, Kasbati, or Naik, is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer.

APPEAL 34 of 1914, being three consolidated appeals from judgments and decrees (16th April 1909 and 11th April 1911) of the High Court at Bombay, which varied and affirmed a decree (30th November 1907) of the District Judge of Ahmedabad.

The question for determination in this appeal was as to the nature of the tenure upon which a village called Charodi in the Ahmedabad district was held by the plaintiffs (Bai Nandbai and Bai Rajbai) in the suit out of which the appeal arose. Bai Nandbai died pending the suit, and Bai Rajbai claimed to be her heir, and to

represent the interest of both of them in these appeals, in one of which Bai Rajbai is the respondent, and in the other the appellant.

Bai Nandbai was the widow of one Fatumiya who died about 1891 without issue; and Bai Rajbai was the only daughter of one Bapabhai Fatumiya's brother's son who died about 1893-1894. Fatumiya and Bapabhai belonged to a class of Mahomedans known in the district as Kasbatis [residents of the Kasba (city or town)] and they and their lineal ancestors had been in possession and management of the village of Charodi intermittently for several generations. The plaintiffs claimed to be entitled to the permanent possession and management of the village subject only to the right of the Government to levy jamabandi or revenue assessment upon certain terms. The Government of Bombay on the other hand (as represented by the defendant) denied that the plaintiffs had any permanent right to the village, and claimed that they were entitled to resume it.

The series of transactions between the Government and the Kasbatis commenced soon after the cession of the Pargana of Viramgam in the northern part of the Ahmedabad district to the East India Company by the then Gaekwar of Baroda. That was in 1817, and there were then seventeen Kasbati villages in that Pargana, of which the village Charodi, and two other villages called Karla and Lea were held by the ancestor of Bapabhai and Fatumiya. All the seventeen villages were, pending the consideration of the Kasbatis' claims, managed by the British Government until 1822, when with the sanction of Government an arrangement was entered into by Mr. Williamson, the Assistant Collector in charge of the district, with all the Kasbatis by which eight of the seventeen villages were to be permanently retained by Government, and the remaining nine handed back to the

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Kasbatis (one to each set of claimants), upon the conditions contained in certain pattas or leases subsequently issued to them by the Collector. Under that arrangement the village of Charodi was made over to one Jehangirbhai, the father of Fatumiya, and the paternal grandfather of Bapabhai. The original patta was not produced but from the Government Records it appears it was dated 17th May 1823, that the rent was Rs. 100 per annum and that it was for a term of seven years at the end of which period the village was to be handed over to Government.

On 31st August 1833 a new patta for the village for a further period of seven years from the expiration of the previous term was granted by the Collector on behalf of the Government to Bapabhai and Miyabhai, the heirs of Jehangirbhai, the original grantee, at an annual rent of Rs. 142 subject to more detailed and stringent conditions. In 1838 a third patta for a similar term appears to have been granted but of which neither the original nor any copy was forthcoming.

On the expiration of the last named patta, in 1845, it was proposed by the Collector to increase the rental of all the nine villages, but the Kasbatis refused to agree, and claimed that the arrangement made in 1823 with Mr. Williamson was a permanent one: and all the villages including Charodi were therefore taken again under Government management for some years. The proposal of the Collector was, however, eventually endorsed by the Government notwithstanding the objections of the Kasbatis, and orders were made that new pattas should be granted to them for a further period of seven years at an enhanced rent, and reserving the right of the Government to raise the rent at any future time.

This arrangement was accepted by Bapuji and by Fatumiya and on 4th September 1849 a new patta of

the village Charodi was granted to them at an annual rent of Rs. 144-1-9 for the seven years from 1844 to 1851 for which they gave a formal acknowledgment. On the expiration of that patta no new one was granted, but the Kasbatis continued to hold upon the same terms until 1860, when a fresh patta was granted for one year. In 1861 another patta for one year was granted to Fatumiya and Bapabhai at a rental of Rs. 160 and other similar pattas were granted to them in 1862 and 1865. From 1866 to 1870 settlement proceedings were taking place in the Ahmedabad district, and no new lease is recorded as having been issued for Charodi, though the then existing lease appears to have been renewed from year to year and the rent sometimes increased.

In 1874 there was a failure of issue of the Kasbati lessees of the villages of Karla and Lea (two of the nine villages above referred to) and they were resumed under a resolution of Government of 27th November, it being declared that their tenure was merely leasehold and that "on failure of heirs" (meaning apparently direct male heirs) the villages lapsed to the Government. Karla was claimed by Fatumiya as being the nearest collateral heir of the last holder, and his claim was eventually referred to the Secretary of State for India who decided the matter on 5th July 1877, agreeing with the decision of the Government of India that the Kasbatis were not proprietors but merely leaseholders, and consequently rejected the claim. Fatumiya and Bapabhai thereupon instituted in 1878 a suit in the District Court of Ahmedabad against the Secretary of State for India in Council claiming to be entitled to the village (Karla) as heirs of the last holder and founding their claim on an alleged sanad or grant in or about 1693 from one of the Mogul Emperors to one of their ancestors. The District Judge, however, held the document to be forged, found that the last holder

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of the village through whom Fatumiya and Bapabhai claimed was only a leaseholder, and not a proprietor, and dismissed the suit with costs.

The question of the renewal of the Kasbati leases had come again before the Government in July 1877, who affirmed the view that on the expiration of such leases the tenants held only "at the pleasure of Government," but decided that such leases should (except in cases where the family of the original grantee had become extinct) be renewed for a period of seven years at a nominal increase of rent. In August 1877 the Charodi tenants applied for a lease of Shahpur, another of the nine villages, in respect of which a similar failure of issue had occurred as in the cases of Karla and Lea above referred to, on the ground that they were collateral heirs of the last holder, but the application for renewal of the lease in their favour was rejected by Government, the applicants not being direct heirs. In 1878 a form of lease was prepared under the directions of Government to be adopted in respect of all Kasbati villages, in which it was provided that the lessee should, on the expiration of the term of the lease, make over possession to the Government; and on 22nd December 1879 a lease in this form was granted to Fatumiya and Bapabhai and was signed by them, but they alleged in the present litigation that their signatures "were not made by them of their free will and pleasure," and Government for that reason did not rely on that lease in this suit.

In 1896 the claims of the present plaintiffs to a renewal of the Charodi lease came again before Government and it was then decided in accordance with the principle above accepted by the Secretary of State that renewals could be granted only to direct male heirs, and the claims were consequently disallowed subject, however, to any proposal that might be made as to life

pensions to the claimants. On a petition in May 1897 for a consideration of their claims on the strength of the alleged sanad of 1693 which had previously been held to be a forgery further investigation of the matter was made; but in December 1897 the Government being satisfied that the sanad was not genuine re-affirmed their previous decision, and refused to renew the lease of Charodi to the plaintiffs and ordered them to hand over the management of the village to the Government on 31st July 1898, whereupon after due notice to the defendant the present suit was instituted for a declaration that the plaintiffs were entitled to the possession and management of the village. They did not refer to the leases above mentioned, nor rely upon the sanad of 1693; but their claim was based on alleged ownership and possession for more than two hundred years.

The defendant denied the right of ownership alleged by the plaintiffs and (having decided not to rely upon the lease of 1879 for the reason above stated) pleaded the previous leases by which he contended the plaintiffs were estopped.

The issues settled were—(1) Is it shown that plaintiffs and their predecessors held the village as lessees and not as proprietors? (2) If so, is defendant not entitled to resume the village? (3) Are the several leases relied on by defendant, or is any of them, inadmissible for want of registration? (4) Are plaintiffs estopped from denying defendant's title to the village in suit? (5) Is the suit barred by limitation? (6) To what relief, if any, are plaintiffs entitled?

The District Judge as to the first issue held that the onus of proving it was on the defendant, and that he had not discharged it; and that issue and issues 2, 4 and 5 were accordingly decided against the defendant. On the 3rd issue he held that the leases did not require

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registration ; and on issue 6 that the plaintiffs were entitled to the declaration prayed for, but subject to the right of Government to revise the jamabandi (which was not disputed) ; and a decree was made to that effect.

After going at great length into the origin and history of the Kasbati holdings, and considering the numerous documents in evidence, the District Judge summed up his conclusions as follows :—

“(1) The history of the settlement of 1823 leads to no other conclusion than that the villages left to the plaintiffs' ancestors were intended to be kept by them permanently though it was open to the Government to revise the jama.

“(2) The patta (in exhibit 143) so far as it contained any words capable of a different meaning was a nullity.

“(3) Mr. Cruikshank in 1825 and Mr. Rogers in 1851 classed the plaintiffs' ancestors among Taluqdars.

“(4) Numerous other officers also addressed them as Taluqdars.

“(5) Even the President in Council in 1862 referred to one of the Viramgaum Kasbatis as a Taluqdar.

“(6) The incidents of the tenure were those of a Taluqdari one. The plaintiffs' ancestors' lands descended from father to son, and the jama was a percentage of the assessment. Mr. Peile says that the Kasbatis were allowed 30 per cent. The owners also mortgaged their lands and decrees were obtained against them as if they were private property.

“(7) In the Government registers the plaintiffs' lands were never entered as Khalsa. They were entered as Kasbati to distinguish them from *Gameti* and not because they were not held on a Taluqdari tenure.

“(8) Mr. Peile's statements and maps show the Kasbatis' villages as Taluqdari.

“(9) As these villages were Taluqdari, the Ahmedabad Taluqdars' Act (Bombay Act VI of 1862) was applicable to them and the Gujarat Taluqdars' Act (Bombay Act VI of 1888) is expressly applicable to them.

“(10) The plaintiffs have been in possession certainly since 1823 and the onus being on the defendant to show that he can eject them, that onus has not been discharged.”

An appeal by the defendant to the High Court came before CHANDAVARKAR and HEATON JJ. who in an interlocutory judgment substantially affirmed the decree of the District Judge, but found that the plaintiffs' right to hold the village permanently was subject to conditions, and remanded the suit to the District Court for the conditions to be ascertained. The conclusions of the High Court were summed up as follows :—

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"The tenure of the Kasbatis must be determined by the circumstances attending the restoration to their possession of nine villages and the subsequent negotiations and agreements between them and the Government. The initial circumstances suggest very clearly that the restoration was not of a temporary but of a permanent character. But there are words in the earliest of the pattas, which literally interpreted would mean that the restoration was of a purely temporary character. Nevertheless these words are easily capable of a different interpretation, and a different interpretation is indicated by the circumstances in which they were used.

"The subsequent events show with perfect clearness that the Kasbatis understood that the restoration was permanent and that the Government, if they had any real doubt as to that matter which is uncertain, never expressed their doubt to the Kasbatis. The latter have continued to hold for now more than eighty years and from the very earliest period of their holding nothing has been said to them or done by Government in relation to them, to indicate to them that they had anything but a permanent holding in the nine villages, that is until the notice to quit was given which has led to this suit. On the other hand much has been said and done to assure the Kasbatis that they held permanently.

"I use the word 'permanent' throughout as contrasted with the word 'temporary' and not in the sense of 'perpetual,' for it is perfectly clear that though the Kasbatis held permanently in the sense which I mean, they did not hold unconditionally and the Government undoubtedly have taken power to themselves, and the kasbatis, at any rate, in 1849, accepted the existence of this power, to resume the villages, if the conditions imposed were not fulfilled. One of these conditions has consistently been that the Kasbatis should not alienate their interest in the management of the villages. Besides this and other expressed conditions, there may have been others, which were only implied. And it is this possibility which led the Advocate General, in appeal, to advance a contention, which had never been advanced in the Court below. He said, even if we assume that the holding was permanent, yet the evidence

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shows beyond doubt that it was to be permanent only with the Kasbatis ; that they were left in management of the villages for their maintenance and the support of their dignity ; and that it cannot possibly have been the intention of Government, or part of the terms on which the villages were restored to their management, that they should ever pass away from the Kasbatis. And, he says, the moment that the management is continued to female heirs—and the plaintiffs are female heirs—there arises the possibility of the villages passing into the hands of those who are not Kasbatis. The solution of the difficulty here suggested depends upon determining whether there was an implied condition that the villages should not descend to females, or if females were allowed to hold, to their heirs or descendants, who might not be Kasbatis. The existence or non-existence of such an implied condition can only be determined by a scrutiny of evidence adduced for the purpose of proving or disproving such a condition. And the evidence adduced in the lower Court was not directed to that object. In that Court the attitude taken, and throughout maintained, by the defendant was, not that they had a right to put an end to the possession of the plaintiffs, because of the breach of some condition on which the Kasbatis held the village, but that they had an absolute, unconditional right to put an end to their possession.

“On the case so presented, the defendant has failed, and it seems to me that we ought not now to determine this suit on a contention never raised in the Court below, and one to which the adducing of evidence has never been directed. And therefore I do not propose to say anything, one way or the other, as to whether the evidence, which is on the record, does or does not go to establish such a condition.”

The District Judge on the remand under the preliminary decree of the High Court, after recording statements from both parties as to the conditions on which the village was held, and some additional evidence, delivered judgment to the effect that “all the conditions and restrictions which the Government had thought fit to retain had already been imposed by express legislation,” and that no condition need therefore be embodied in the final decree to be passed on the appeal.

The defendant filed objections to the findings and judgment of the District Judge on remand and the matter came again before the same two judges of the High Court who set aside the findings of the District Judge and held that the conditions ought to be deter-

mined and embodied in the decree and they accordingly proceeded to determine such of the conditions as were still in dispute between the parties, and eventually a final decree was drawn up declaring that the plaintiff Bai Rajbai was entitled to the possession and management of the village on the conditions set out in that decree.

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Both parties appealed both from the preliminary decree of the High Court and from the decree made after remand.

On these appeals,

Sir H. Erle Richards K. C., and *G. R. Lowndes* for the Secretary of State for India contended that the tenure of the village of Charodi by the plaintiffs and their predecessors in title, and their rights therein had been of a leasehold nature only, and they had no right of ownership in the village or its revenues. They sued to enforce a proprietary right in the village, existing prior to British rule which they alleged they had derived through their ancestors who received leases from the Mogul, which were subsequently renewed by the Mahrattas, and after the British conquest were continued by the British Government. But the only right that could be enforced in this suit (if any) is that given by the British Government in 1823. All other rights were swept away on annexation by the British Government: see *Cook v. Sprigg*.⁽¹⁾ Even the provisions of a treaty would not bind the Crown. If the Government renewed leases it was only done as a favour: the Government, it was submitted, was never bound to renew. The leases were given for the up-keep of particular families, and the wish and intention of the Government was that the leases should terminate when a family died out, that is, on the death of the last

⁽¹⁾ [1899] A. C. 572 at p. 578.

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male heir in the direct line. It seemed reasonable that the Government should, on the termination of the male line of a family, have the right to resume the village, a right which they were willing not to exercise if there were a widow or daughter who could temporarily retain the village. The main point was that the Government should be entitled to resume when a family died out. In three cases, on the termination of the male line, the villages were resumed; that was with respect to the villages of Karla, Lea, and Shapur in 1874. The Kasbatis, it was contended, were leaseholders "at the pleasure of the Government:" they held temporary leases at the will of the Government in whom the right of renewal was vested. In the first patta it was stated that there was no right of renewal, and in none of the other pattas was there any provision for its renewal, when its term expired; and from the absence of any such provision it must, it was submitted, be inferred that the right of renewal was never given to the plaintiffs' predecessors. Reference was made to the "Account of the Talukdars of Ahmedabad Zillas, and the measures adopted for their restoration under and in connexion with the Ahmedabad Taluqdars Act (Bombay Act VI of 1862)," by J. B. Peile, C. S. Taluqdari Settlement Officer (Ed. 1867, Bombay), and to his "Memorandum on the Kasbatis of Ahmedabad Zillas." They were never, it was submitted, "Taluqdars," to whom Bombay Act VI of 1862, or the Gujerat Taluqdars Act (Bombay Act VI of 1888) was applicable, though that name had been applied to them by Mr. Peile: used in a general sense the word "Taluqdar" meant "anybody who paid revenue to Government:" see Wilson's Glossary. If they were Taluqdars under those Acts they were only "tenants at will," as in the recital. Bombay Act VI of 1862, Preamble, and section 20, and Bombay Act VI of 1888, sections 26 and 34 were referred to: there was no section in the Act of 1888 similar

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to section 20 of the Act of 1862. Reference was made to *Waghela Rajsanji v. Shekh Mastudin*⁽¹⁾ which it was contended only applied to Taluqdars. In construing the pattas between the plaintiffs and the Government the Courts below had adopted methods of investigation to ascertain the intentions of the parties to those agreements which, it was submitted, were not open to them to employ. For their interpretation the terms of the pattas should be strictly adhered to, all extrinsic evidence being excluded by the provisions of section 92 of the Evidence Act (I of 1872); see *Balkishen Das v. Legge*⁽²⁾. "Patta," invariably meant a lease, and if so, the nature of the plaintiffs' tenure was "leasehold," and that being so, it was submitted that they could not, being lessees of the Government, deny the title of the Government as their lessors; and reference was made to the Evidence Act, section 116, and, for the definition of "lease" to the Transfer of Property Act (IV of 1882), section 105. The predecessors in title of the plaintiffs had accepted leases of the village in suit or of its revenues from the defendant, and his predecessors in title, and had continued in possession and paid rent under such leases, and were estopped from denying his title. Under the circumstances proved in the case the defendant was entitled to resume the possession and management of the village.

De Gruyther K. C. and *J. M. Parikh* for the plaintiff Bai Rajbai contended that she had established her title to the village in suit anterior to the British occupation; a title by arrangement with and recognition by the British Government; and also a title by statute. On annexation, all land belonged in theory to the Government. The first act of the Government was to make settlements of it. In doing so pre-existing rights were always recognised; that was so even after

(1) (1887) 11 Bom. 551; L. R. 14 I. A. 89.

(2) (1899) 22 All. 149; L. R. 27 I. A. 58.

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the confiscations of land in Oudh. "Patta" was a term used in several senses : in parts of Bombay the ryot is the actual proprietor of the soil, cultivating it with proprietary rights. Taluqdars were persons who are proprietors of the land, but not cultivators of the soil. The first patta in this case was not the origin of the plaintiffs' title. "Kasbati" tenure was not one "at the pleasure of Government." The plaintiff's ancestors were classed with and considered to be Taluqdars, as is shown by the documentary evidence on the record of the case. Mr. Elphinstone in his minutes in 1821 says he had "no doubt the Kasbatis should be included in the class of Taluqdars." See Mr. Elphinstone's minutes, pages 469, 470, 481 (paras. 25, 27, 30); 484 (para. 34). Mr. Peile's Report on the Ahmedabad Zillas, and memorandum on the Kasbatis was cited to the same effect. Legislation applicable to Taluqdars was made applicable to Kasbatis; and extracts of proceedings in the Legislative Council on the Ahmedabad Taluqdars' Act (Bom. Act VI of 1862) were referred to, to show this. The District Judge in his judgment in the case after remand says, "The whole law on the subject of Taluqdars' holdings was modified in 1888, by the Gujerat Taluqdars' Act (Bom. Act VI of 1888) when the whole of the Bombay Land Revenue Code (Bom. Act V of 1879) was applied to them. Kasbatis were then held to be Taluqdars, and section 2 makes the whole law applicable to them." Reference was made to Bom. Act VI of 1888, preamble sections 1, 2 (1), 4 (1), 10, 22, 23, 24, 31, 33 and by section 29A the whole Act; Bom. Act V of 1879, sections 3 and 73; and Bombay Regulation XVII of 1827. Preamble sections 7, 8 (1) and section 20, as legislative enactments which had been so made applicable. The cases of *Kooldeep Narain Singh v. The Government*⁽¹⁾; *Collector*

⁽¹⁾ (1871) 14 Moo. I. A. 247 at p. 256.

of Trichinopoly v. Lekkamani⁽²⁾ and *Waghela Rajsanji v. Shekh Masludin*⁽³⁾ were referred to, as to the recognition by the Government of the rights of the Taluqdars and others, and the evidence of the existence of proprietary rights derived from long possession and receipt of rent, by persons paying revenue to Government or holding estates descended for generations from father to son ; the contention being that the Kasbatis had by reason of the legislation referred to obtained rights which gave them a heritable and transferable tenure of the property. It was submitted that the Government had failed to show any right to eject the plaintiff. In none of the pattas was there any provision that the lessee should deliver up possession at the end of the lease. The inference from the absence of such a provision was that the lessee had a legal right to continue in possession after the term of the lease had expired. The settlement in 1822 with the plaintiff's ancestors of the village on which the amount of jama was fixed, gave a permanent tenure of it with a right to manage it and was inconsistent with the grant of the pattas, unless the latter could be said to have dealt not with the tenure, but only with the jama and mode of management of the village which it was submitted was the case. On the plaintiff's appeal it was contended that she was entitled to retain possession without any conditions or restrictions other than those imposed by statute. The High Court had erred in inserting in the decree conditions and restrictions which were not warranted by the statutes governing the plaintiff's rights, or by any other law. As to the decree which should be made the Bombay Land Revenue Code (Bombay Act V of 1879) section 70 was referred to.

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(2) (1874) L. R. 1 I. A. 282 at pp. 306, 313.

(3) (1887) 11 Bom. 551 at pp. 562, 563: L. R. 14 I. A. 89 at pp. 97, 98.

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Sir H. Erle Richards K. C. replied referring to Bombay Acts V of 1879 and VI of 1888 as giving no title to land; the latter Act made no change in the condition of the holders of land. See section 2 (1) (definition of Taluqdar), 31, 33 *m*, 34 and 38*a*; Bombay Act V of 1879, section 3 (4), (11), (13), 68 and 73; and Peile's Report on Taluqdars in connection with Bombay Act VI of 1862, pages 11, 14, 25, 36 (4) and (7), 40, 41, which made it clear that the Kasbatis were merely tenants at will. Reference was made to *Administrator General of Bengal v. Premlal Mullick*⁽¹⁾ in which it was held that the objects and reasons for an Act of the Legislature were not admissible as evidence on a question of the construction of the Act.

1915 June 3rd.—The judgment of their Lordships was delivered by

LORD ATKINSON:—These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively the 16th of April 1909, and 11th of April 1911, modifying a decree of the District Judge of Ahmedabad, dated the 30th of November 1907, in Suit No. 7 of 1898 in his Court.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Charodi, about 2,200 acres in extent, situated in the pargana Viramgam, in the district of Ahmedabad in the province of Gujarat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the Courts below her right has been also based apparently upon the following title, namely

(1) (1895) 22 Cal. 788 : L. R. 22 I. A. 107.

this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village: but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would enable her to succeed in this action. In order to arrive at a conclusion on the issue thus in dispute between the parties it is necessary to examine briefly the history of this district of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Mahomedans in religion, said to have originally come from Delhi under the Great Mogul, and styled indifferently Casbatees and Kasbatis, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Charodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai *alias* Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapabhai, his only issue him surviving, and Bapabhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the Kasbatis class who was in possession of this village of Charodi at the date

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of the aforesaid cession. The term Kasbatis, it is not disputed, was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by ryots, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. At the time of the cession the Kasbatis were possessed of seventeen villages within the pargana of which Charodi was one. The settlement of the territories ceded was not practically undertaken till the year 1822-1823.

In the interval an accredited public official of the Company was put in charge, duly authorised to investigate the local conditions, and make suggestions and recommendations for the carrying through of this work. In the conduct of this business and in discharge of these duties he made reports to his superiors in which he sketched the history of the Kasbatis, the Grassias, and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding Sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers of management and control. Some of these reports have been received in evidence apparently without objection. On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date the 3rd of August 1822, to the Secretary of the Government of Bombay, and the second bearing date the 28th of May 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were seventeen villages in the Viramgam pargana, held for a considerable number of years by several families of

Kasbatis under a peculiar kind of tenure ; that their possession had been frequently interrupted, and had not therefore been sufficiently continuous to found prescriptive rights ; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the pargana, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had been intended than that the villages should remain in their temporary charge ; that after the grant of the farm of Ahmedabad by the Peishwa to the Gaekwar, the Kasbatis had enjoyed the produce of some of these villages for twenty-five or thirty years on a revenue which was increased or lowered according to the pleasure of the local managers ; that in 1804 they were dispossessed of these latter by one Babaji Appaji, a manager of the Peishwa, who demanded a higher jumma than the Kasbatis would consent to pay, but were restored to possession ten years later ; that thus by a train of circumstances of such an undefined nature that it was difficult to describe them, the class had acquired a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government ; that since the authority of that Government had been established at Ahmedabad revenue settlements had been made with them, except where they refused to pay an adequate jumma,

" but being men of ignorance or bad circumstances and of very indolent habits," they were altogether incompetent to conduct village concerns ; that their villages were of vast extent and capable of much improvement ; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called lease-holders), and that he had every reason to believe they would be well satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

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Mr. Williamson then proposed for the consideration of the Government a plan to this effect: to give to each Kasbati one, or according to the circumstances and claim of the particular person, two, of the smaller villages on a jumma less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Government Secretary wrote to the assistant in charge of the collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date the 22nd of November 1822, acknowledging the receipt of the latter's letter of the 3rd of August previous, and informing him that though the plan he suggested might be agreeable to the Kasbatis, the Governor in Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the Kasbatis pensions, to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The Kasbatis refused to accept pensions, but Mr. Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the Kasbatis should be secured in permanent possession of such of their seventeen villages as should be left to them. Whereas on the 28th of May 1823 he wrote to the Collector of Ahmedabad informing him that he (Williamson)

" had concluded an arrangement with the Kasbatis of Virangam by which they are to retain, during the pleasure of the Government, nine of the villages found under their management when the Pergunna fell into our possession. "

He proceeded to point out that by this arrangement the interference of the Kasbatis would be removed from eight of their villages, the produce of which was valued at Rs. 13,800, while that of those remaining with them was only valued at Rs. 5,300, but that the jumma in respect of these latter was so small, namely, Rs. 1,925, that there would remain for their maintenance Rs. 3,375, a sum differing but little from that of Rs. 3,820, which, according to his calculation, was all that would have been available for their maintenance had they continued in possession of their seventeen villages. Then follows this passage:—

" The lease being granted for seven years affords the Kasbatis an opportunity of availing themselves of these capabilities (*i.e.*, the capabilities of their villages of improvement). The condition of the villages and the rules respecting leases laid down by Government guided me in fixing the term. "

On the 23rd of June 1823 the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an—

" agreement with the Kasbatis by which they are to retain during the pleasure of Government nine of the villages found under their management when the Pergunna fell into our possession. "

The expression "at the pleasure of Government" is not very happily chosen. Since leases for terms of seven years were to be given to the Kasbatis, it obviously could not have meant that they were to hold these nine villages merely as tenants at will of the Government. What it must, in their Lordship's view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases the Government would be free to deal with them as it pleased,

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to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports it is essential to consider what was the precise relation in which the Kasbatis stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new Sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these ante-cession rights of the Kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become

relevant subjects for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower Courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *The Secretary of State in Council of India v. Kamachee Boye Sahaba*⁽¹⁾ decided in the year 1859, and *Cook v. Sprigg*⁽²⁾ decided in the year 1899.

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In the first this Board had to deal with the action of the East India Company in seizing in exercise of their Sovereign power, in trust for the British Government, the Raj of Tanjore, and the whole property of the deceased Rajah, as an escheat, on the ground that, by reason of the failure of the male heirs of the latter the dignity of the Raj was extinct, and that the property of the Rajah had thereby lapsed to the British Government. Lord Kingsdown, delivering the judgment of the Board, is, at page 540, reported to have expressed himself thus :—

“ The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company ; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy. ”

Now, in that case the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding Sovereign

(1) (1859) 7 Moo. L. A. 476;

(2) [1899] A. C. 572.

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the paramount chief of Pongoland. The appellants sought to enforce in a Court of law their rights under this concession against the English Government to which the territory over which the concession had been given was ceded by this chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which Municipal Courts are authorised to enforce. As far, therefore, as the legal rights of the Kasbatis, enforceable against the Indian Government in Indian Courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the Kasbatis may have been quite erroneous. The Kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own *regime*.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests, in this case, upon the respondent. The Kasbatis were not in a position in 1822 to reject Mr. Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Williamson's

terms had the permanent possession of their villages not been promised to them. It may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the Kasbatis fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance.

Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no patta or kabulayat, executed in 1823, was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a patta granted to the Kasbatis then in possession of the nine villages retained by them, including this village of Charodi. According to these records a patta of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a jamabandi of Rs. 100, with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow any one to give any land of the village in Pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the patta they absolutely negative the existence of any legal right enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

As to this village of Charodi, one must start then on the inquiry as to what rights were granted by the

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Bombay Government to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which have elapsed between the year 1822 and the institution of this present suit, not even in one of the several pattas granted to them is any provision to be found to the effect, that upon its expiration a new patta is to be granted to the lessees or their representatives or successors, while the very first of these pattas contained a clause expressly negating the existence of such a right. The reasonable and proper inference to be drawn from the silence of the pattas on this important point is, Sir Erle Richards on behalf of the appellants contends, that the legal right to obtain renewals of the pattas was never conferred upon the respondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but, unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instruments could scarcely have been more obscure, had obscurity been aimed at, and have resolutely omitted from every patta but the first the ordinary provision to be found in every properly-drawn lease, that the lessee shall deliver up possession at the end of the term. Mr. De Gruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the patta, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in possession of this village of Charodi, in which the amount of the jumma was fixed; that the effect of such a settlement is that the person in possession by

whom the jumma is to be paid, was fixed or settled permanently in the possession, at all events, of this village, with a right to manage it, that the pattas could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the patta only dealt with the jumma and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well founded, it is necessary to examine in detail the provisions of those pattas the contents of which are satisfactorily proved.

First, then, as to the pattas granted on the 31st of August 1833. In the year 1827, during the currency of the first lease a report was made to the Taluqdari Settlement officer by Lieutenant Melville, of the 7th Regiment, in which he described the Kasbatis of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under pattas for terms of years granted to them by the Bombay Government. No importance can therefore be attached to his use of the word "proprietors." In July 1831 the question of the increase of the jumma fixed by the first batch of leases was under consideration. Several Kasbatis presented a petition to the Government insisting that the jumma fixed in 1822 was then fixed permanently, and should not be increased, also asserting that it was part of the arrangement made by Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated 16th September 1831, was to the effect that the order made by the Government on the 16th of November 1822 could not be set

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aside. Sometime thereafter the above-mentioned lease was granted to Bapabhai, the father of Fatumya, and his brother, Miabhai, as the lessees. It is endorsed as having been delivered to the latter. The jumma is increased to Rs. 142, payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830-31 and terminating in the year 1836-37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the patta, and cause the revenue of the village to be collected by other hands, the lessees being responsible for any deficit in one year in which the patta is taken over, and that at the end of that particular year the Government

"would if it so pleases give the village to some person other than the lessees, who it was asserted shall not get it,"

but should be held liable for any loss which might accrue to the Government during the remainder of the term.

The seventeenth clause provides that if the Government should find that the lessees were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matters, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the patta would be taken back from them, and they would have to pay such a penalty as the Government might choose to impose.

The facts that the granting of a patta for seven years was part of the arrangement made with Mr. Williamson, and that the patta then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the

transfer of the village in certain events to persons other than the lessees, are quite destructive of the theory that these pattas merely regulated the amount of the jumma but not the tenure, and that independently of them altogether this family of Kasbatis was fixed in permanent possession of this village of Charodi. In the year 1838 a new patta was apparently granted for seven years, but neither the original nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commissioner of Ahmedabad a report, dated the 8th of September 1845, proposing, amongst other things, to increase the jumma of this village. In it he sets forth in paragraph 5 that the Kasbatis being sent for in order to enter into a fresh settlement, declared that the settlement made by Mr. Williamson was permanent and that the jumma was not to be increased. They were unwilling to take leases, on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the Kasbatis to the receipt of 20 per cent. on the revenue pending the pleasure of Government. In the 10th paragraph of the report he proceeds to add:

“ This long enjoyment of the villages at the same rental has increased their (*i.e.*, the Kasbatis) real or feigned impression that the original settlement was permanent, which it certainly was not. ”

He then proposed that the rent of the villages should be slightly increased, and that if the Kasbatis did not accept the leases offered, the villages should continue under the direct management of the Government, and the Kasbatis should be allowed 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's

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arrangement. They only differed as to its terms. The Kasbatis insisted that according to it the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter dated 24th February 1847, addressed by the direction of the Governor in Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the Kasbatis did not appear from the former proceedings connected with the settlements previously made with them to have any valid title to

“a permanent continuance of the terms upon which they have hitherto held their villages,”

and suggesting that the jumma should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor in Council desired that a distinct reservation should be inserted in the new lease endorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, an allowance being made to the Kasbatis during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the Kasbatis as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the Kasbatis and take the management of these villages into Government hands.

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The existence, however, in the Bombay Government of the power and right which they assert in this letter of the 24th of February 1847 belonged to them, is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new patta of the village, bearing date the 4th of September 1849, was granted to Fatumiya and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years from (1844-45) to (1850-51) at the increased yearly rent of Rs. 144-1-9, payable by five instalments on the days therein named. The lease is executed by the lessees. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It is provided first, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. Secondly, that the lessees shall not alienate or pledge the village or the land composing it to anyone. Thirdly, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should therefore make good arrangements for the prevention of crime in the village, or otherwise the (tharav) settlement would be cancelled. Fourthly, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the

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Courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried on by the Government, the (tharav) settlements would be cancelled, and the whole income of the village to be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, No. 11, but evidently introduced to put an end for the future to all controversy touching the increase of the jumma. It provides that the village is given to the lessees on patta according to the settlement or agreement thereinbefore set out, that when the lease expired the lessees should hold charge of all income and produce of the village, and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. The eleventh clause provided that the village was given on patta to the lessees on the agreement thereinbefore set out, and that if they did not act accordingly to the agreement the patta should be void.

The existence of the statement that the patta was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent, the two lessees and another person had presented a petition to the Revenue Commissioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the patta merely fixed the amount of the rent, and that by the settlements the

lessees or their ancestors had acquired as against the Bombay Government a right to the property in, or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced, indicating even in the most remote way that the lessees were entitled at the end of each lease to have a renewal of it granted to them. *Prima facie* a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term. In order that the respondent should succeed, therefore, on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal. In their Lordships' view it would require something much more clear, plain, and explicit than this confused, and almost unintelligible clause, to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new patta was granted in 1851. The lessees continued to hold possession and to pay the rent till 1860. Fresh pattas for one year each were given in the years 1860 and 1861, at an increased rent of 160 rupees, and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the Kasbatis under Mr. Williamson's settlement, namely, the villages of Keela

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and Leah, or Lea. The said Fatumyia claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor in Council passed a resolution, dated the 27th November 1874, by which it was declared that the tenure of the Kasbatis was merely leasehold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on the 5th of July 1877 approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a sanad granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this sanad was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere leaseholder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any Court of law. The question of the renewal of the leases of the Kasbati tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on the 25th of July 1877 passed by that Government to the effect that it appeared all the leases had expired, that there was no necessity to make any change, it being quite clear that the villages were held on leasehold tenure at the pleasure of the Government; that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue

so to do, and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up, and on the 7th of October 1878 approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease, the lessee should, without objection or obstruction, yield up the village demised unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on the 22nd of December 1879 was granted to Fatumyia and Bapabhai, the respondent's father. The kabulyat was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not therefore desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently entertained by the Government in reference to the true position and rights of the Kasbatis. No further leases were granted. The lessees and those who succeeded them continue to pay the rent reserved, notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai requiring them to quit and deliver up possession of the village of Charodi on the 31st of July following. It was not disputed that if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the Kasbatis and their villages, including that of Charodi, has alone been dealt with.

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Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the burden which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangement; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Charodi claimed by her; that they never recognised or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned); that this Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village; and that the granting or withholding of a lease of it rested from the first solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the Grassias. They were ancient Rajput proprietors, and before the cession of the Ahmedabad Zilla, stood to their native sovereigns in that relation, their lands being cultivated by ryot tenants from year to year and at will. They and the Mewassies were clearly distinguishable from the Kasbatis. The last-named held their lands by

contract, neither by sanad nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the Grassias and those of the Kasbatis. The word "Taluk" was first applied to these Rajput proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the Grassias, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government, altogether irrespective of what their position and rights may have been before the cession of their territory.

All this is stated at length in the account by J. Peile, Taluqdari Settlement Officer of the Taluqdari of Ahmedabad Zilla, and the measures adopted for their restoration under and in connection with the Act VI of 1862 of the Bombay Legislature, published in 1867, pages 7, 9, 14, 42, 43-47, 64 and 67. Indeed in the preamble of that Statute it is recited that these Talukdari estates are only held on leasehold tenure determinable at the pleasure of the Government. So that the case of the Grassias makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new Sovereign, when it comes to be a question of legal right the contract with the new Sovereign is conclusive and the rights against the old Sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act VI of 1862, for the reasons given in the abovementioned publication of Mr. Peile, does not apply to Kasbati lessees at all. They never were Taluqdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their

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land by taking leases, as did the Grassias, and therefore did not suffer the injustice which the Statute was designed to remedy.

The Statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, &c. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the above-mentioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a Taluqdar is defined to include "a thakur, mehwassi, kasbati, and naik." Section 23 provides that nothing in the Act shall be deemed to affect the validity of any agreement entered into before the passing of the Act by or with a Taluqdar and still in force as to the amount of his jumma, nor of any settlement of the amount of jumma made by or under the orders of Government for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not been passed. And section 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By section 33 it is also provided that the word "Taluqdar" shall be substituted for the word "occupant," the words "registered Taluqdar" for the words "registered occupant," and the words "Taluqdars holding," or such words to that effect as the word occupancy when applying this Code of 1879 to the estates to which this Statute of 1888 applies. The seventy-third section of the Code provides that "the right of occupancy" shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a hereditary and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution of the words "the right of occupancy" for the words "the right or the interest of a Taluqdar" in or to his holding, is that a Kasbati's interest in a leasehold held for a term of years is changed in its nature and becomes a hereditary and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation : and notwithstanding also that by section 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "Taluqdar" or a "thakur," "mehwass," "kasbati," or "naik," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted and *prima facie* no longer. Section 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these Statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the passage printed at page 496 of the Record in which the High Court deals with the lease of 1833 :—

"There are no other provisions for forfeiture of the management. There is no provision for renewal of the patta, but it is to be inferred from the nature of the management and from the fact that the patta was for a term, that renewal was contemplated. This inference is supported by both previous and subsequent events : by previous events, because in 1823 permanent possession by the Kasbatis was contemplated : by subsequent events, because the renewal did, in fact, take place."

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Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both Courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed and the cross-appeal dismissed, and that judgment should be entered for the Secretary of State, dismissing the respondent's action. And they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Solicitors for the Secretary of State for India in Council:—*The Solicitor, India Office.*

Solicitors for Bai Rajbal:—*Messrs. T. L. Wilson & Co.*

Appeal allowed.

Cross-appeal dismissed.

J. V. W.

PRIVY COUNCIL.*

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[On appeal from the High Court of Judicature at Bomby.]

Bombay City Land Revenue Act (Bombay Act II of 1876) sections 30, 35, 39, 40—Certified extracts of Rent Roll of "quit and ground rent" land—Office of Collector of Bombay—Statements therein as to nature of tenure of land—Suit by mortgagee relying on such extracts and advancing money on title there disclosed against Secretary of State—Act only for administration and collection of revenue—No estoppel created in matters of title—"Sanadi" tenure.

The Bombay City Land Revenue Act (Bombay Act II of 1876) makes provision for the administration and collection of land revenue in the city of Bombay. It is for this purpose only that it sets up machinery, namely, to ascertain who is liable to pay revenue. The Collector is a revenue official,

* *Present* :—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title which is to supersede other means of conveying or registering the title to land, or to relieve purchasers or mortgagees from the ordinary obligations to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the Act nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed, and do not purport to be decisive either of the rights of Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

Where, therefore, the appellants, in a suit against the respondent, claimed that they had advanced money on mortgage relying on statements in certified extracts from the Rent Roll of "quit and ground rent" land kept in accordance with the provisions of the said Act in the office of the Collector of Bombay to the effect that the land was of "quit and ground rent," and not of "Sanadi" tenure, and therefore not liable to be resumed by the Government,

Held, that the respondent was not estopped by such certified extracts from treating the land as being of "Sanadi" tenure, and liable to resumption.

APPEAL 101 of 1914 from a judgment and decree (25th March 1912) of the High Court at Bombay in the exercise of its appellate jurisdiction, which affirmed a judgment and decree (15th July 1911) of the same Court in the exercise of its ordinary original civil jurisdiction.

The question for determination on this appeal is whether a plot of land in the City of Bombay, within an area of about 2,058 square yards, on mortgage of which the appellants had advanced more than Rs. 80,000, was, as between them and the Government, held on "quit and ground rent tenure," or on what is known as "Sanadi" tenure, the latter being liable to be resumed by the Government.

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According to the appellants' case the "quit and ground rent tenure" is one of the best known and most valuable of the various tenures on which land in the City of Bombay is held under Government, the annual rent being at the rate of 11 reas per square yard. It was stated in the plaint and not denied that properties held under this tenure in Bombay were "freely bought and sold in the market and treated as being little, if at all inferior to freehold tenures." Grants of "Sanadi" land on the other hand generally contained a condition that Government might resume the land on giving six months notice and consequently were admitted to be far less valuable than if held on "quit and ground rent tenure."

Government have always kept Rent Rolls of all lands on which any rent or assessment is payable, in which transfers of ownership are registered, and such Rent Rolls were in practice the basis of investigations as to tenures.

By the City of Bombay Land Revenue Act (Bombay Act II of 1876), however, it was enacted in section 39 that the Collector of Bombay should prepare and keep a separate Register and Rent Roll of every description of land, according to the nature and terms of the tenure on which such land was held; and by section 40 that all records of the City of Bombay survey concerning the land or the land revenue should be kept in the Collector's office, and be open to the inspection of the public, and that certified extracts therefrom, or certified copies thereof should be given to all persons applying for them.

Almost all the land now in dispute was originally granted under a Sanadi grant in 1824 at an annual rent of 11 reas per square yard, but a small part was apparently an encroachment on adjoining Government

land, and was "newly assessed" at a different rate in 1879. Before 1878 the original plot had been always entered in the Rent Rolls of land in the new Town Kamatipura in which District it was situated; all land in this District, with the exception of some plots granted on Sanads and of leasehold, being of quit and ground rent tenure. In 1879 after the passing of Bombay Act II of 1876, a special Rent Roll was opened for all "quit and ground rent" land in the City, and the original plot was entered therein as "quit and ground rent" land. In 1880 a piece of land, 95 square yards, was added, and a note made that it was "newly assessed ground and added," but from 1885 when a new Rent Roll was opened for "quit and ground rent" land the whole plot in dispute (including the newly assessed portion) was entered in it, and shown as being all held at the 11 reas rate as quit and ground rent land. The records of the land were so kept until 1908, when the record of the land in question was transferred to a new Rent Roll, which was then, for the first time, opened for "Sanadi" land.

In 1889 an entry was made in the Rent Rolls of the transfer of the plot in suit, registered on 19th January, from one Allawoodin Jawanji to Abdul Husein Ibrahimji, the owner of the plot, and who had mortgaged it to the appellants, and in accordance with the practice of the Collector's office, a notice bearing that date was served upon Abdul Husein, notifying him of the amount payable by way of assessment on ground rent upon the plot, and of the place and time for paying the same, and describing the land specifically as "quit and ground rent land."

Abdul Husein deposited the title-deeds of the land, in January 1892, with one of the Banks in Bombay by way of equitable mortgage, and Messrs. Gostling and Morris, a firm of surveyors, were employed to investigate the

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title at Abdul Husein's expense. That firm on 19th January 1892 applied to the Collector to furnish them with certified extracts of the revenue survey of the lands, and also "an inspection and certified extract from the Rent Rolls showing the ownership of the property," from 1842 to that date. Three certified extracts signed by the then Assistant Collector were thereupon furnished to Messrs. Gostling and Morris, and paid for, and on them that firm approved the title of Abdul Husein, and the Bank with whom the title-deeds of the land had been deposited advanced him a loan. The extracts were headed (a) "extract from Rent Rolls of quit and ground rent land for the years 1841-42, and 1843-44," (b) "extract from Rent Roll of quit and ground rent land for the years 1878-79 and 1879-80," and (c) "extract from Rent Roll of quit and ground rent land for the years 1885-86," and each extract described the land as paying rent at the rate of 11 reas per square yard.

In October 1892 Abdul Husein applied to the appellants for a loan upon a mortgage of the land, and the appellants instructed their Solicitor, Mr. K. D. Shroff, to investigate the title for that purpose. He inspected the title-deeds at the Bank, the notice of 19th January 1889, and the three extracts (a), (b) and (c), and on the strength of those documents, he was satisfied without further inquiry that the tenure of the land was "quit and ground rent," as therein described, and after some further investigation of Abdul Husein's title (apart from the question of tenure) which involved another reference to the Collector's records prior to 1844, he advised the appellants that the title was good, and that the tenure was "quit and ground rent," and on this the appellants advanced to the mortgagor Rs. 36,000, and a formal mortgage was executed by him in their favour, the mortgaged property being therein described as

of "quit and ground rent tenure." On 23rd October 1896, the 28th June 1897, and the 15th August 1901, the appellants made further advances to the same mortgagor on the security of the same land, and in all three deeds of further charge the same description was given of the land. On 20th September 1900, prior to the execution of the last of the three deeds of further charge, the appellants entered into possession of the land, and in January 1901, and thereafter until 1908, the Government rents were paid by the appellants, who received receipted bills for them from the Collector's office, the land being in each bill described as of "quit and ground rent" tenure.

In 1908, when the Record of the land was transferred as before mentioned, the land was in the receipted bill described for the first time as "Sanadi land" instead of "quit and ground rent." Notwithstanding the protest of the appellants against the form of the receipt the Collector refused to do anything in the matter; and on 24th January 1910 the appellants brought the suit out of which this appeal arose, praying for a declaration that the land in dispute was of quit and ground rent tenure, and that the respondent had no right to resume it under the Sanad, and for consequential relief. Abdul Husein was also joined as a defendant, but he did not appear, and took no part in the proceedings, and consequently he was not made a party to this appeal.

The defence was that the land in dispute was held under the Sanad of 1824, and denied the appellants' right to the relief they claimed. The first defendant denied that he had by any declaration, act or omission caused or permitted the plaintiffs to believe that the land in suit was of quit and ground rent tenure, and submitted that he was not estopped from setting up the true title and claiming his rights thereunder. He alleged that the Collector never intended or contem-

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plated that the second defendant or the plaintiff should act upon the documents in the plaint mentioned in the manner alleged, and submitted that the Collector had no authority to give up or vary the rights of the Government under the Sanad of 1824, and that the suit should be dismissed with costs.

Of the issues raised the following only were material in this appeal.

“(1) Whether the Collector of Bombay had any power to vary the tenure of the land in suit ?

“(2) Whether this defendant is bound by any declaration, act or omission of the Collector, tending to vary the said tenure ?

“(3) Whether this defendant or the Collector of Bombay by any declaration, act or omission intentionally caused or permitted the plaintiffs to believe that the said land was of quit and ground rent tenure ?

“(4) For what purposes were the extracts, copies whereof are exhibit B to the plaint, taken in 1892 ? and who obtained them and on whose behalf ?

“(5) Whether the plaintiffs could and ought not, by the exercise of reasonable diligence in 1892 and before they advanced moneys on mortgage to the defendant 2, have discovered that the said lands were the subject of a Sanad ?

“(6) Whether the plaintiffs, when they advanced the moneys alleged in the plaint, concerned themselves with the tenure of the said lands ?

“(7) Whether the plaintiffs, in advancing the said moneys, acted upon any belief engendered by the defendant or the Collector of Bombay that the said lands were of quit and ground rent tenure ?

“(12) Whether having regard to the circumstances mentioned in the plaint, defendant 1 is not now estopped from claiming that the said lands are Sanadi lands ?”

At the hearing the second plaintiff deposed that the plaintiffs would not have entered into the contract of mortgage if they had known that the land on which their loan was secured was of Sanadi tenure ; and Mr. Shroff, their Solicitor said he was satisfied with the title disclosed on the extracts above mentioned, and that if he had been aware that the land was “Sanadi”

land, he would not have advised the plaintiffs to take the mortgage.

For the first defendant witnesses were called from the Collector's office : (a) that the practice as to certified extracts from the Rent Rolls was that they should be made out by the applicant, and only certified as correct by the Collector, or his Assistant, and that the extracts above referred to were so made. Rules purporting to be made by Government under section 40, Bombay Act II of 1876, were also put in evidence, Rule VI of which provided that copies of extracts were to be made by the applicants or their agents : (b) that of the extracts copied, though all were headed as being taken from Rent Rolls of "quit ground rent" land, only the second and third were in fact so taken, the extract for 1841-44 being extracted from Rent Rolls entitled "Rent Rolls of New Town Kamatipura," though it would appear that the label containing this title was partly obliterated : (c) that in the Rent Roll for 1878-79 on the page from which the second extract was taken, a note in red ink in the following terms "*vide* Sanad, dated 3rd February 1824" which had been there at all events since April 1878, but which had not been copied into the extract : and (d) that in another of the public records of the Collector's office referring to the land in suit, namely, the Register of Revenue Survey of 1868-69, there had been for sometime prior to 1887, another pencil note, "as per Sanad, dated 3rd February 1824."

The trial Judge in the High Court (BEAMAN J.) decided the first and second issues in favour of the plaintiffs holding that if the representations relied on by them were really made by the Collector, the first defendant would be bound by them if made in negligent breach of his statutory duty with the intention or effect of inducing the plaintiffs to believe that land which was in fact Sanadi was of a quit and ground rent tenure.

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On the merits of the case he held that Gostling had made a personal inspection of the Rent Rolls in Laughton's Revenue Register and had seen the entries referring to the Sanad ; that he had made his own extracts, and had obtained the notice of the 19th January 1889 from the second defendant ; that neither Gostling nor Shroff cared whether the land was Sanadi or quit and ground rent, inasmuch as until comparatively recently no practical distinction existed or was made between them ; that Gostling was responsible for his extracts which were not representations by the Collector, who was not responsible for defective inquiries made by applicants for inspection ; that in this case the Collector-ate records in so far as they were representations could not and did not mislead either Gostling or Shroff ; that the entries in the Rent Roll of 1878 and Laughton's Revenue Register were there before them ; that the extracts and notice were not representations by the Collector certifying that the land was a quit and ground rent tenure as distinguished from a Sanadi ; that in any event they were not addressed or made to the plaintiffs and could not raise in their* favour any right of estoppel ; that the evidence was conclusive to show that until very recent times persons dealing in land regarded Sanadi lands as favourably as quit and ground rent land ; that the plaintiffs were not by any of the documents or representations alleged caused to alter their position, nor would they have acted in any way differently had they known from the first that the land was held under a Sanad. The trial Judge accordingly held that there were no circumstances which would raise in the plaintiff's favour any estoppel as against the first defendant, and dismissed the suit with costs.

An appeal from that decision was heard by the High Court in its appellate jurisdiction by SIR BASIL SCOTT, C. J. and RUSSELL J, who held on the first and second issues

(differing from BEAMAN J.) that the first defendant would not be bound or estopped by acts or omissions of the Collector amounting to negligent representations in breach of his statutory duty, but that even assuming that he would be so bound and liable, the evidence in the case did not establish any such representation or breach of duty on the Collector's part.

It was also held in concurrence with the trial Judge that the entry as to the Sanad appeared in the Rent Roll and Revenue Register at the time of Gostling's and Shroff's inspections and were there for long before ; that neither Gostling nor Shroff considered the question of the tenure ; that Gostling had personal inspection of the Rent Roll and that his clerk made the extracts ; that Gostling's object in obtaining the extracts was to trace the devolution of the property, and not for the purpose of getting official certificates as to the tenure ; and that Gostling did not attach importance to the entry as to the Sanad, because both classes of land were the same. It was further held that the plaintiffs did not claim under the Chartered Mercantile Bank by whom Gostling was employed when he obtained the extracts ; that the extracts contained no representation by the Collector such as alleged ; that the notice relied on was not directed to the plaintiffs, nor was it a representation as to the tenure at all, nor did it purport to represent the contents of any Register or Rent Roll ; that Sanadi lands in New Town were also known as quit and ground rent lands, and that this was the correct inference from the Collectorate Records up to 1908. The appellate Court therefore held that the first defendant was not estopped from setting up the true nature of the property, and dismissed the appeal with costs.

On this appeal :

P. O. Lawrence K. C., Raikes, and Lowndes for the appellants contended that the respondent was estopped

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from disputing that the land in suit was of quit and ground rent tenure, and had no right to resume it under the Sanad of 1824. On the extracts from the Rent Rolls obtained from the Collector's office the appellants' Solicitor was quite justified in concluding that the land referred to in them was of quit and ground rent tenure. They were certificates given by a Public Officer under sections 74 and 75 of the Evidence Act (I of 1872), and as such were legal evidence of the contents of the Rent Rolls under section 77 of that Act. It was, it was contended, only reasonable, under the circumstances, for him to rely on their accuracy. Reference was made to the Bombay City Land Revenue Act (Bombay Act II of 1876), sections 39, 40. They were all that was necessary for a Solicitor in Bombay to obtain in order to show that the tenure of the land was "quit and ground rent" tenure. The extract (c) was a very important one; and had it been the only one granted it would have justified the Solicitor in recommending the title; there was no indorsement on it referring to any Sanad. Even if the notes were made in the extracts referred to (and both the Courts below have found that they were), no steps had been taken in the Collector's office to correct the Rent Rolls in accordance therewith, for in the Rent Rolls for the years 1885-86 from which extract (c) was made the land in suit was still described specifically as being of quit and ground rent tenure. The notice under Bombay Act II of 1876, section 12, dated 19th January 1889 also described the land as being "quit and ground rent land." Also certain receipts for revenue so described the land in suit. For a long period the respondent had dealt with the appellants on the basis of their being quit and ground rent tenants and it was submitted he was estopped from now dealing with them on quite another basis, namely, that the land was liable to be resumed by the Government under a Sanad. The Evidence Act

(I of 1872), section 115 was referred to as to estoppel. The character of the tenure was guaranteed to the public by the certificates from the Collector's office which, it was submitted, were representations by the Collector to the recipients of them that the land referred to in them was of the nature there stated. It was immaterial by what channel the contents of the entry reached the public. An estoppel was created by the entry in the Collector's Books of which the certified copies are given to the public when applied for. Reference was made to *Coventry v. Great Eastern Railway Company*⁽¹⁾ as to the liability of public companies who issue mercantile documents and it was pointed out that the distinction between that case and the present case drawn by BEAMAN J., was not justified, inasmuch as there was no evidence whatever here that the records of the Collector's office were ever "revised, recasted, reinvestigated, or corrected." Under Act II of 1876 the Collector was bound to keep separate records of the "quit and ground rent," and the "Sanadi" tenures so that on application any member of the public should be able to ascertain by inspection and search what is the tenure of any particular plot of land. The rule made under the Act and followed in practice, that the extracts from the Registers and Rent Rolls should be made by the applicant, while the Collector or his staff merely certified the extracts to be correct, would be *ultra vires*. It could not at any rate relieve the Collector from responsibility. The Preamble of the Act was referred to. It had to do with revenue not title. [LORD SHAW referred to section 35 which enacted that "the registration or transfer of any title in the Collector's records shall not be deemed to operate so as in any way to affect any right, title or interest of Government in the land, house, or other immoveable property in respect of

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⁽¹⁾ (1883) 11 Q. B. D. 776.

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which any such transfer is made or registered"]. That referred only to the transfer of ownership mentioned in section 30 of which notice has to be given to the Collector by the transferor and transferee. The "registration" referred to in sections 30 and 35 mean registration under the Indian Registration Act. Under the circumstances of the case, it would, it was submitted, be inequitable to allow the respondent now to assert a title under the Sanad of 1824.

Counsel for the respondent were not called on.

1915 June 29th.—The judgment of their Lordships was delivered by

VISCOUNT HALDANE:—The facts in this case are really not in controversy. The appellants have advanced on mortgage of land in the City of Bombay Rs. 80,000. They claim against the respondent, the Secretary of State, that they advanced this sum to Abdul Hussein Ibrahimji, the mortgagor, relying on statements in certified extracts from the Rent Roll of quit and ground rent land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of Sanadi tenure. The question to be decided is whether the appellants, who were plaintiffs in the Courts below, are entitled to a declaration that the respondent is estopped from treating the land as of Sanadi tenure. In Bombay both of these tenures exist. The land in question is in fact held under a Sanad which purports to enable the Government to resume possession for public purposes on giving six months notice and providing compensation for buildings and other improvements. For the purposes of the question to be decided their Lordships assume, although the point is not conceded, that if the land were held on the other tenure it would be contrary to the practice of the Government, if not to the law, to

resume possession, and that the land would be in consequence more valuable as a security. It is not, however, clear that such a view has always prevailed or that the difference between the two tenures was regarded as important at the time of the mortgage.

The Sanad was granted by the Government of Bombay in 1824, a rent of 11 reas per square yard being reserved. Such a rent would have been the usual rent had the land been of the other tenure.

In January 1892 the mortgagor had granted a security over the land for an advance from the Chartered Mercantile Bank. A Mr. Gostling, partner in the firm of Gostling and Morris, land surveyors in Bombay, had been employed to report on the security and the title. He inspected certain entries in the Collector's Rent Rolls and in what was called Laughton's Revenue Survey Register, both of which were kept in the office of the Collector. In the entries which he inspected there were express references to the Sanad with which the title originated. He applied to the Collector for "certified extracts" from the rolls and register. These extracts were, in accordance with the rules which obtained, made by his own clerk, and were formally certified by an assistant of the Collector as correct. The extracts were, however, inaccurate in certain points. In one of them the title given was "Rent Roll of Quit and Ground rent," instead of, as it should have been in accordance with the book from which it was taken, "Rent Roll of Land situate in New Town or Kamatipura." In another of the extracts, the entry in the Rent Roll from which it was taken contained a reference to the Sanad of 1824, and this was omitted in the extract. Mr. Gostling, in addition, obtained from the mortgagor a notice in which the Collector required payment of a small sum as rent for "the quit and ground rent land situate at New Town." He also in-

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spected the title deeds. These did not go back as far as the Sanad of 1824, but on one of them, dated in 1843, there was an indorsement to the effect that the registration of deeds of transfer did not imply any relinquishment of the right of ownership in, or the power to resume, the land at the pleasure of the Government, but that the sole object of the register was to enable the Collector to apply to the proper person for the payment of the rent.

Mr. Gostling does not appear to have been deterred by this indorsement, or by the references to a Sanad, from recommending the title. Their Lordships think that in 1892, when he made the investigation, importance was not attached in the same degree as later on to the difference between the two tenures. It appears to have been thought that in neither case was there substantial likelihood of the Government resuming the land.

On the 25th October 1892, some ten months after the first advance, the mortgagor obtained advances on second mortgage from the appellants. The latter employed a solicitor named Shroff to investigate the title and advise as to the security. His evidence shows that he inspected the title deeds at the bank and also got hold of the certified copies of the extracts from the Collector's Rent Rolls and the Collector's notice to which reference has been made. He appears to have applied to the Collector for access to certain of the records and to have obtained it. At all events he searched the records, which not only did not indicate that the tenure was quit and ground rent, but which contained a reference to the Sanad of 1824. It is probable that he was not paying more attention to the difference between quit rent and Sanadi tenure than had Gostling or the Collector's clerk who checked the extracts made by Gostling's clerk. In the end he advised the appellants to proceed with the mortgage.

The case made for the appellants, who were plaintiffs at the trial, was that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector has estopped the respondent, the Secretary of State, from denying that the land is of quit rent as distinguished from Sanadi tenure, and that the appellants are entitled to a declaration of title on that footing. In order to determine whether this is so, it is necessary to ascertain what was the duty of the Collector and his position in relation to the Government and the public. The Collector, prior to 1876, kept in his office what were called Rent Rolls of land, on whatever tenure held. After 1876 this practice continued, but was regulated by the Bombay Act II of that year, known as the Bombay City Land Revenue Act, 1876.

Under this Act, which extends only to the City of Bombay, the controlling authority in all matters connected with the land revenue is vested in the Collector of Bombay, subject to the Governor in Council. The duty imposed on him is to fix and levy the assessment for land revenue. The liability is to be settled with the superior holder of the lands, subject to an appeal to the Revenue Judge, who is to be the Senior Magistrate of Police. There is a further appeal to the High Court on its appellate side. The existing survey and the demarcation of lands already made, and all the records of this survey are to be *prima facie* evidence. Corrections of such demarcation or of entries in the records of the survey may be made by the Collector, or by order of a competent Court.

Part VIII of the Act relates to transfer of lands. Section 30 provides that whenever the title to immoveable property subject to the payment of land revenue to the Government is transferred, the transferor and the

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transferee are to give notice to the Collector. Any transferor who fails to give notice is, in addition to being liable for a penalty, to continue liable for the payment of land revenue until notice is given or transfer is effected in the Collector's records. In case of dispute as to the making or completion of any entry or transfer, the Collector may summon the parties and take evidence and decide summarily what entry should be made. Section 35 provides that the registration or transfer of any title in the Collector's records shall not be deemed to operate so as in any way to affect any right, title, or interest of the Government in the property in respect of which such transfer is made or registered. In the final part of the Act, which is headed "Miscellaneous," it is provided that it shall be the duty of the Collector to prepare and keep, in such form as the Government shall from time to time sanction, a separate register and Rent Roll of every description of land, according to the nature and terms of the tenure on which such land is held. All maps, registers, and other records are to be kept in the office, and to be open to the inspection of the public, who are to be entitled to obtain extracts or certified copies.

Their Lordships are of opinion that the Act must be treated as defining the extent of the rights of any one who consults the maps, register, and records at the office, and that in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. When it is so read their Lordships think that this purpose and the nature of the rights conferred are not doubtful. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the

collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

From this conclusion as to the scope of the Act it follows that what has taken place in the present case has not given the appellants any right to claim that the Government is prejudiced in any right it has to treat the land in question as of Sanadi as distinguished from quit rent tenure. Nor are their Lordships satisfied that at the time of the investigation of the title in 1892 the parties themselves really attached much importance to the statements as to tenure in the extracts and other documents produced. They appear to have inspected the deeds in the usual fashion, and to have concerned themselves with the question of who was the owner of the land rather than with the question of the rights of the Government. In the view which has been taken, it is not necessary to deal separately with the question raised under section 35 of the Act as to whether any

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right, title, or interest of the Government could be affected by the registered entry.

Their Lordships will humbly advise His Majesty that the appeal fails and ought to be dismissed with costs.

Solicitors for the appellants : Messrs. *E. F. Turner & Sons.*

Solicitors for the respondent : *The Solicitor, India Office.*

Appeal dismissed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

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November 6.

KHIMJI VASSONJI AND ANOTHER (PLAINTIFFS) v. NARSI DHANJI AND OTHERS (DEFENDANTS).*

Marriage, contract of—Procuring breach of contract—Conspiracy—Cause of action—Malice, an essential ingredient—Tort.

The first plaintiff betrothed his son, the second plaintiff, to one J. Subsequently J.'s father married her to the first defendant. Thereupon the plaintiffs brought this action against the first defendant and his sisters, the second and third defendants, to recover damages, alleging that they (the defendants) had plotted and conspired together wrongfully to procure the breach of the first contract of marriage.

The conspiracy alleged was not proved at the trial nor was it proved that the first defendant knew at the time of his marriage with J. of her previous betrothal to the second plaintiff.

Held : (1) that the suit was not maintainable ;

(2) that no legal right inhering in the plaintiff had been violated, since, according to Hindu law, by which the parties were governed, a father was entitled to break off his daughter's engagement should a more suitable bridegroom be available.

* Original Civil Suit No. 494 of 1913.

In an action of conspiracy to procure a breach of contract malice is an essential ingredient of the cause of action.

Rule in *Lumley v. Gye*⁽¹⁾ considered and its universal applicability doubted.

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THE plaintiffs in this suit were father and son. In August 1910 the first plaintiff on behalf of the second plaintiff entered into a contract with one Mulji Khimji for the marriage of Mulji Khimji's daughter Jamnabai with the second plaintiff. In pursuance of the said contract the betrothal ceremonies of Jamnabai and the second plaintiff were duly performed. According to the terms of the said contract the plaintiffs were to provide Rs. 5,500 worth of ornaments for the bride. This the plaintiffs did not do and therefore Mulji in March 1913 determined, if possible, to secure another bridegroom for his daughter.

Towards the end of March 1913 Mulji went to Calcutta and there entered into negotiations with the first defendant who was then a widower regarding the marriage of his (Mulji's) daughter. The first defendant agreed to marry Jamnabai and on the 17th April Mulji took her together with a bridal party to Calcutta and on the following day first a betrothal ceremony and afterwards the marriage ceremony were performed.

The plaintiffs thereupon brought this action against the first defendant and his two sisters to recover the sum of Rs. 20,000 as damages. The cause of action was alleged as follows :—

“ After the betrothal of the said parties, the defendants, well knowing of the said betrothal, plotted and conspired together, without just cause or excuse, and for their own ends wrongfully to procure and induce the breach of the said contract of marriage and to have the said Jamnabai married to the first defendant instead of to the second plaintiff. The plaintiffs submit that the defendants are liable to the plaintiffs for the said amount of damages inasmuch as they have, without justification and for their own ends, conspired to violate

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and interfere with and have violated and interfered with the rights of the plaintiffs under the said contract of marriage to have the said marriage performed and to which the plaintiffs were entitled. The plaintiffs are at all times willing and anxious to have the said marriage performed."

The defendants all filed written statements in which they denied that they had plotted or conspired, either together or with any other persons, to procure a breach of the contract between the plaintiffs and Mulji. They also denied any knowledge of Jamnabai's engagement to the second plaintiff.

Wadia with Jardine (acting Advocate General) for the plaintiffs.

Davar with Setalvad for the defendants.

BEAMAN, J.—The plaintiffs, father and son, sue the defendants for damages alleging that the three defendants conspired with each other and others not made parties to this suit, to procure the breach of a contract of marriage entered into by one Mulji, not a party, with the first plaintiff on behalf, respectively, of Jamnabai, the daughter of the said Mulji, and Kanji, the second plaintiff. The material undisputed facts are that the girl Jamnabai was formally betrothed by her father Mulji in 1910 to the second plaintiff, the contract being made according to the usages of the caste between Mulji and the first plaintiff. The terms of the contract were that the plaintiffs were to provide Rs. 5,500 worth of ornaments for the bride.

Early in March 1913 Mulji appears to have contemplated making another marriage for his daughter, as he alleges, because he had already broken off the engagement with the second plaintiff on account of the plaintiffs' failure to comply with the conditions of the original betrothal. Towards the close of March, Mulji went to Calcutta and appears to have sounded the first defendant

who was then recently a widower. The first defendant is a much wealthier man than the first plaintiff or second plaintiff.

The first defendant agreed to marry the girl, Jamnabai, who was now rather over-mature in the opinions of these people to be left unmarried any longer.

Accordingly, on the 17th April, Mulji took the girl and a bridal party to Calcutta, where they all put up in the house of the first defendant. Overtures appear to have been made to the local Jamat that evening, but the customary dues were refused. The following morning, the betrothal ceremony was first performed and thereafter the marriage. The result is that Mulji, the father of the bride, as well as the first defendant have been excommunicated for breaking off the girl's engagement to the second plaintiff and marrying her to the first defendant.

An enormous amount of irrelevant evidence, about the past history of the first defendant and many other matters, has been accumulated. It is unnecessary to refer to any part of it. There is also much evidence about the manner in which the marriage of Jamnabai to Narsi, the first defendant, was hurried through, as well as the customs of this caste, and the attitude adopted by the Jamat, the complaint made to the Jamat by the plaintiffs and the like, the only bearing of which upon the points to be decided is, that it might heighten the probability of the first defendant having been fully aware of the previous engagement of the girl to the second plaintiff. There is also a good deal of evidence as to the subsequent conduct of the defendant intended to prove that he knew very well that he had deliberately wronged the plaintiffs and desired to hush the matter up. Except, again, as bearing upon defendants' knowledge of the pre-existing contract, this is immaterial.

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Mulji's story is that he had a perfect right to break off the first engagement when the plaintiffs would not make the last three thousand rupees worth of ornaments, and that he had, in fact, done so after giving them a stipulated time in which to fulfil their part of the contract. It was only after this, according to Mulji, that he offered his daughter to the first defendant. The plaintiffs deny that they ever refused to perform any part of their contract and allege that the father of the girl threatened to withhold his daughter for three years after the last ornament had been made. The first defendant says that he knew nothing at all of the previous engagement till after his marriage with Jamnabai on the 18th April 1913.

Clearly, if the first defendant did not know of the contract between Mulji and the plaintiffs the plaintiffs would have no cause of action against him, either as an individual for procuring the breach of a subsisting contract, or as a conspirator with others for the same object. And it has caused me much doubt since the case was opened whether in the facts and circumstances alleged in the plaint it discloses any cause of action against any of the defendants. It is to be noted that the case is laid in conspiracy. And surveying the history of the law of conspiracy since its origin in the first writ which ever issued on such a count in the Civil Courts, at the end of the thirteenth century, up to such cases as those of *Allen v. Flood*⁽¹⁾ and *Quinn v. Leathem*,⁽²⁾ it might be doubted whether any such action could have been maintained consistently with its historical development and theoretical origin without an ingredient of malice. No malice is alleged on the part of the defendants in this case. But ever since *Lumley v. Gye*,⁽³⁾ which was not a case of conspiracy, mere knowledge of the existence of a contract, which

(1) [1898] A. C. 1. (2) (1901) 85 L. T. 289. (3) (1853) 22 L. J. Q. B. 463.

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it was the object of the individual or of a body of conspirators to get broken, has been held in law to be tantamount to malice. So it was summarily stated by Crompton J, in delivering the judgment of the Court in *Lumley v. Gye*.⁽¹⁾ Nevertheless it is worth noting that even in that case, the pleadings alleged malice on the part of the defendant. Erle J.'s dictum appears to have been made the foundation of the later law, which may now be taken to govern, in England, all cases of the kind, whether put on the ground of conspiracy in the old sense or merely upon the ground of procuring the breach of a contract, as in *Lumley v. Gye*.⁽¹⁾ In the latter class of cases, analogies from the old conspiracy action are introduced, probably on the supposition that there has still been a conspiracy between the defendant and the person induced to break the contract. The English law on this subject is extremely interesting and the judgments of the numerous great Judges who took part in the decisions of such cases as *Lumley v. Gye*,⁽¹⁾ *Mogul Steamship Company v. McGregor, Gow & Co.*,⁽²⁾ *Flood v. Jackson*,⁽³⁾ *Allen v. Flood*,⁽⁴⁾ and *Quinn v. Leathem*⁽⁵⁾ seem to invite the closest analytical scrutiny. For it can hardly be denied that they are full of dicta which are in conflict, and in no case can any of the broader generalizations to which some of our greatest Judges have committed themselves be considered as having really settled any one definite and consistent principle. Erle J. said that procuring the violation of any subsisting right was a cause of action, and the violation of the right an actionable wrong. This appears to have been adopted either expressly or by implication by Lords Watson and Macnaghten in *Allen v. Flood*⁽⁴⁾ and *Quinn v. Leathem*.⁽⁵⁾ But when the judgments of all the learned law Lords in these

(1) (1853) 22 L. J. Q. B. 463. (2) [1892] A. C. 25. (3) [1895] 2 Q. B. 21
 at p. 37. (4) [1898] A. C. 1. (5) (1901) 85 L. T. 289.

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cases come under critical examination it will be found, I think, that they contain many pieces of questionable or at least imperfect reasoning and attempts at definition, which have not really succeeded in defining permanently or universally the notions in controversy. On the strength of these and many other earlier and some later judgments, text-book writers have settled down comfortably on one or two general propositions, as for example, "it is now settled law that procuring the breach of a contract is a good cause of action," and that "in civil actions for conspiracy malice is not but damage is the gist of the action." Lord Esher said in *Flood v. Jackson*,⁽¹⁾ that merely persuading a man to break his contract with another gave no right of action in the civil law, unless it were done maliciously. That would make malice the gist of that kind of action, and *a fortiori*, in all conspiracy actions, the gist of the action, in one sense. The word "gist" is a bad word having but a very loose and ill-defined meaning. If the word "essential" be substituted for it, then we shall see at once that notwithstanding the emphatic dicta of Lord Watson and Lord Macnaghten that the intentions of the conspirators mattered nothing at all, malice, either express or constructive, still remains an essential of all these actions. It is not the "gist" of the action in another sense of course. That is to say, unless damage is caused, a mere malicious attitude of mind or malicious intention will not give a cause of action. It is only in that sense that it is true, I submit, that malice is not and damage is the gist of the action. Nor is it even now strictly true to say in the widest sense, that a man's mental state has nothing to do with an action of this kind. This is too plain to allow of argument when we find it universally conceded (and indeed this is implied in every pleading) that unless the

⁽¹⁾ [1895] 2 Q. B. 21 at p. 37,

defendant knew of the contract which he is alleged to have conspired to break or the breaking of which he has procured, no action would lie against him. It might be said that knowledge can be proved as a fact, whereas intention cannot. But in the eye of the law intention has to be found as a fact in ninety-nine out of every hundred criminal convictions and if mere knowledge is held in law to involve malicious intention for all purposes of an action for damage for procuring the breach of a subsisting contract, nothing much is gained, in the direction of theoretical perfection at any rate, by peremptorily ruling out all considerations of intention. There is, in fact, whatever the law may choose to presume in its rough and ready fashion, a great difference between mere knowledge and a malicious use of that knowledge. But the term "malice" in law has long been the despair of all clear thinkers, and it is probably too late now to attempt to clarify the fog which has gathered about this legal concept.

It may be doubted whether any practical difficulty was experienced in administering the law governing, either (1) conspiracy actions, (2) actions for unlawfully and maliciously procuring the breach of a contract, until *Lumley v. Gye*⁽¹⁾ gave an enormous extension to a doctrine, which up to that time had been kept within narrow and intelligible limits. It is matter of judicial history that the decision in that case gave rise to much conflict of opinion and grave doubts. But Lord Macnaghten took occasion to say in *Quinn v. Leatham*⁽²⁾ that in his opinion, it was rightly decided. So again almost all the Irish Judges first concerned with *Quinn v. Leatham*⁽²⁾ openly lamented the decision of the House of Lords in *Allen v. Flood*⁽³⁾ as constituting a wide and questionable departure from the law as it formerly stood. To get anything like a clear perception of the

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entanglements of reasoning and the subtle difficulties underlying the judgments in the long series of cases usually cited in the later judgments a broad line of cleavage ought, it is submitted, to be drawn and strictly observed between actions on the ground of conspiracy, and heterogeneous actions which have really nothing to do with conspiracy at all, but have been gradually drawn into the current of legal thought and decision on this subject by way of analogical illustration. For example, the old case of the decoy ducks and nothing whatever to do with, either conspiracy, or procuring the breach of a contract. The ground of that decision involving a distinction too subtle, I think, to be maintained consistently, was, as far as I can make anything out of it, that the defendant was liable because his act was not only malicious but wrongful in itself, being in the nature of a nuisance. If he had alarmed the plaintiff's decoy duck area, by firing on his own land in pursuit of his own game, it would seem that he would not have been liable, but he was held liable because he fired for no other purpose than to injure and annoy the plaintiff. Similarly, the *Schoolmaster's case*⁽¹⁾ was not a case of conspiracy at all, but a case of procuring the breach of a contract. At least I suppose that would now be thought to be its true ground, though it might also have been presented as an instance of maliciously injuring a man in the peaceful pursuit of his own trade or profession. It is an interesting case, because it appears to me to conflict in principle with *Lumley v. Gye*⁽²⁾, and to be referable, so far as the reasons governing the decision go, to the principle of actions for conspiracy. Briefly, the formula of all conspiracy actions is the same, that A B C maliciously conspired together to do a rightful act by wrongful means or to do a wrongful act by rightful means, or to do a wrongful

⁽¹⁾ *Gloucester Grammar School case* (1410) 11 Hen. IV. 47.

⁽²⁾ (1853) 22 L. J. Q. B. 463.

act by wrongful means. Such ingredients exhaust, I think, the content of the legal notion of conspiracy in the civil law. But unless damage was caused there could be no action. For then it would be merely *injuria sine damno*. Yet it is important, nay, essential to remember, that the mere conspiracy *per se*, the agreement of the defendants, was in itself a wrongful act in view of the end aimed at or the means by which the end was to be attained. And this marks a distinction and a very necessary distinction to be observed between cases of conspiracy and cases of procuring the breach of a subsisting contract. Here is a very simple case.⁽¹⁾ If A B C all sell their cargos of wheat, then on the high seas, to X a speculator, on condition that they shall be delivered to him at the price agreed, on the ships reaching port, unless they A B C had before that event chosen to re-sell to others. Now, suppose A with the deliberate intention of injuring X re-sells his cargo to M at a lower price, and so deprives X of the bargain. It is pretty clear, I think, that no action would lie by X against A. So if B and C, each for himself and without preconcert, did the same, X would have no remedy. But if A B C maliciously conspired together to injure X by selling their respective cargos to others, then there would have been a case of conspiracy, and the facts being so found X would have had his remedy against them. It is obvious that the damage caused to X would have been exactly the same in the two cases last supposed, yet in the one case, for want of the conspiracy and the malicious intent, there would have been no remedy, while in the other, because of those factors, there would. In such a case how could it be said that malice was not an essential of the action? It might be objected that

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(1) *Note*.—I have taken this and the next instance from an interesting article by Mr. Nolan in the Law Journal.—F. C. O. B.

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here is no conspiracy to do either an unlawful act, or a lawful act by unlawful means. But I apprehend that according to the understanding of the older law, it would be an unlawful act to injure a man maliciously in the pursuit of his trade, and that merely conspiring to do so would be an unlawful means. Whether that understanding could be made to conform with the law laid down in *Allen v. Flood*⁽¹⁾ and in *Quinn v. Leathem*,⁽²⁾ is doubtful. It is not of course an actionable wrong merely to injure a trader by legitimate competition as in the *Mogul case*.⁽³⁾ There was a conspiracy up to that point but as it was held that neither the end nor the means of the conspiracy were unlawful, the action failed. It would have been otherwise had the end been to injure the defendant maliciously. Had the conspiracy been formed not with the sole object of benefiting the conspirators by excluding hostile competition, but out of spite to a particular person to ruin him, although the means employed had been exactly the same, I gather from the reasoning of all the learned Judges, that the plaintiff would have succeeded. In a word, the conspiracy which plus damage gives an action at civil law must be a conspiracy which without damage would have been indictable. A conspiracy to coerce indentured servants to break their labour contracts would certainly have been indictable, and the whole current of conspiracy actions in the Civil Courts shows how directly they are derivable from the peculiar sentiments with which the Legislature long regarded the relations created by contract between master and servant. It may, however, be doubted whether an action could have been brought in the Civil Courts for conspiracy to procure the breach of a great number of other contracts, or whether, in fact, any such case ever has arisen. Yet it is extremely hard to find any distinction in principle.

⁽¹⁾ [1898] A. C. 1. ⁽²⁾ (1901) 85 L. T. 289. ⁽³⁾ [1892] A. C. 25.

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There would, at least, be this refuge which is denied to those who would seek a complete and satisfactory delimitation of the principle to which effect was given in *Lumley v. Gye*⁽¹⁾ that in the former cases the act of conspiring might be declared to be a wrong in itself, while in the latter, there is no such discoverable element. It is obvious too that the use of the term "procuring" suggests a distinction between cases in which the defendant's intention must, on the facts, have been malicious in the widest sense, and others in which, using language in its ordinary sense, it could not have been. Here is another case. A sells a piece of land to P. B desires the land. Knowing that A is a strong temperance man, and that P means to put up a gin palace on the land, B informs A of P's intention, with the result that A refuses to sell the land to P, and afterwards sells it to B. It is clear that, according to Lord Macnaghten's understanding and application of Erle J.'s dictum, B would be answerable to P in an action for procuring a breach of contract. And so he would, presumably if he had merely offered A a higher price. Then the case would seemingly have been on all fours with *Lumley v. Gye*⁽¹⁾ in all material particulars. But would an action lie? Perhaps it would now, but it may be doubted whether it would before *Lumley v. Gye*⁽¹⁾. In the case supposed, if instead of the representation having been made to A by B alone in his own interest, and without any particular malice against P, B C D had conspired to deprive P of his bargain in this way, and had, in furtherance of the conspiracy, made the same representation to A, then if an action would have lain against B C D at the suit of P, it would have been based on the conspiracy and implied malice. Again, if no representation had been made to A but B C D had, as a syndicate, desired to get the land and

(1) (1853) 22 L. J. Q. B. 463.

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had offered a higher price than that agreed upon between A and P, would this have been an actionable conspiracy? I doubt it, and I do not believe that any case of the kind can be found. Yet if B C D knew of the contract between A and P and deliberately induced A by offering a higher price to break it, the case falls within the terms and principle of the law laid down by Lord Macnaghten. There is a large and quite perceptible difference between all such cases of one or more individuals trying to get something already contracted for by some one else for themselves, and all true cases of actionable conspiracy. But as the terminology of the most authoritative judgments stands at present, it is difficult, if not impossible, to express that difference in the terms of any constant principle. Because the one real and substantial criterion, namely, the motive, the malicious motive, has been peremptorily ruled out. But even were that still left for use, it would not suffice. Take such a case as this. A has a valet B who has agreed to serve him for a year. X particularly desires the services of B. He does not know A and has no malice, except in the most extended legal sense of that term, towards A. He offers B higher wages, and B deserts A after three months of the term agreed upon have expired. The ground of A's action against X would now be in the words of the old writ *per quod servitium amisit*. And presumably this was the ground of the decision in *Lumley v. Gye*⁽¹⁾. The same writ would serve in an action for seduction of daughter or female servant, but it takes us far from the ground of the action in conspiracy. Still it may help to bridge the chasm between true conspiracy cases and cases for procuring the breach of a subsisting contract. As a limitation as well as an explanation it may here be of some service. It might be contended that in the

⁽¹⁾ 1853 22 L. J. Q. B. 463.

two first hypothetical cases put, the plaintiff analogically had lost the use of the corn or the land and so the actions were referable to the same principle. In all cases of the *Lumley v. Gye*⁽¹⁾ class, there must be taken to be an existing contractual relation already entered upon and in part performed, before it is broken at the solicitation or by the conspiracy of the defendant or defendants. It is true that we are here met at once by a fresh difficulty. For it has often been said in conspiracy cases that it makes no difference whether the object of the conspiracy be to break off existing contracts, or to prevent the making of fresh contracts. And this is intelligible when we bear in mind the nature of the conspiracy itself, and its malicious direction against the plaintiff. But it certainly would not be true if extended for the purposes of theoretical construction to such a case as *Lumley v. Gye*⁽¹⁾. Had there been no contract between Wagner and Lumley, it is clear that Lumley would have had no cause of action against Gye merely for outbidding him and so securing the services of Miss Wagner for himself. And I think that is universally true of every case properly restricted to the procuring by a single person of the breach of an existing contract for his own benefit. If I am so far right, we come in sight of something like a real distinction which might be embodied in a general rule. Leaving aside for a moment cases of conspiracy, and confining ourselves to cases of procuring a breach of contract, it would then appear that such procuring is only actionable at civil law, when the contract is of a peculiar kind already partly executed and partly to be executed. Even if it is so, it is extremely doubtful whether any logical ground could be discovered apart from conspiracy, and analogies drawn from that action, upon which to justify actions of the limited kind men-

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tioned. It would, for example, be a nice and over-refined distinction to say that if A desiring to obtain the services of B's valet should tempt him away from B a day after he had actually entered upon his service to B there would be a good action at B's suit against A, but not if A had so tempted B's servant after making the contract of service, to break it one day before entering upon it. But the latter case is in no way distinguishable from any other case of procuring the breach of a contract. Eliminating malice, conspiracy, wrongful means and all such special factors, it would come to this, either all procuring the breach of a contract known to the procurer to be subsisting is actionable or none is. Subject to the eliminations just suggested, it is submitted that the proper answer is that none is.

An article is to be sold. A, the proprietor, agrees to sell it to B on the next day. X who greatly desires the article comes to A and offers him £ 500 more than B had offered. A accepts and breaks off his agreement with B. Now if X knew of the agreement with B he would, according to Erle J.'s rule applied by Lord Macnaghten, be liable to B in an action for procuring the breach of A's contract with B, but if he did not, he would not be liable. Yet the damage to B would be exactly the same. The basis of such an action is clearly revealed to be malice (which is a consideration I wish to have excluded in any attempted a reasoned theory of these actions). For if X knows that B has a *prima facie* right to obtain an article which he wishes to obtain for himself, he is presumed to act maliciously towards B in inducing A, the owner of the article, to break off his bargain with B. But this is a mere abuse of ordinary language to cover inexact thought and get over a difficulty which has always been felt, but rarely expressed. In thus grouping a complexity of notions loosely under the dictum that knowledge in all such cases is

equivalent to malice, the Courts have thrown a very wide net indeed, so wide as to embrace every case in which a man knowing of the existence of a contract between two others, persuades or induces the promisor to resile from his contract. Feeling this inconvenience, to use no stronger term, Judges have enwrapped the bare doctrine in a cloud of qualificatory phrases explanatory, or intended to be explanatory, of justification. The action will, it appears, always lie, but it is a good defence in the absence of malice, &c., to show that the defendant was justified in procuring the breach of the contract. What does or does not amount to justification is now shrouded in such a mist of words and phrases that it may be neglected for all purposes of scientific examination. But there is more in the bare doctrine which needs to be scrutinized. In the first place, it seems to ignore altogether the freedom of the will of the first promisor. When the Courts speak of the invasion of an existing right, it is pertinent surely to enquire what are the limits of the right. The right of A to the performance of an agreement entered into between himself and B at the hands of B is a tolerably clear and definite notion. As between these two, A who seeks to enforce the right is the person of inherence and B the person of incidence. Outside persons have nothing to do with it, for them the right does not exist. If A chooses to deny B his right or B chooses to deny A his right, each is at perfect liberty to do so, subject to a claim for compensation in damages, or, if need be, specific performance. In the case supposed, A being the person of inherence, B may refuse to perform his part, and A has his ordinary remedy. It is only on the supposition that B's will is coerced by another so that he is no longer a free agent, that there could be any legal logical ground for the doctrine that the refusal of B to perform his part of the contract thus "invading" or

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“violating” A’s right, gives A any cause of action against anyone else than B. That is where the old conspiracy action takes its stand. It supposes that a combination of persons may so oppress the will of one or more other persons that they cease to be free agents, and their acts are, therefore, really the acts of the conspirators who are therefore rightly made answerable to the aggrieved person. In contract the law assumes that men are perfectly free. It is only he who makes that can break the contract. And again it is only on the assumption that a third person or persons has deprived him of free contractual will, and so substituted his or their will for that of the original contractor that these outsiders could be regarded as answerable in his stead to the person aggrieved by the breach. But where there has been no combination or conspiracy, it is plain that ordinarily no such reason could apply. There might be a case, in which the person procuring the breach of the contract stood in such authoritative relation to the first person of incidence, that the breach might fairly be attributed to the substitution of his for the will of the contracting party. No case of that kind has yet, as far as I know, come before the Courts. And the reasoning I have ventured to suggest is entirely ignored in the broad loose generalizations which cover the decision in the *Lumley v. Gye*⁽¹⁾ class of cases. It is submitted that where a man merely knowing of the existence of an unperformed agreement, without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement or procuring such breach, at the instance of the first promisee. It is clear that there is no principle of law, nor any logical reason why such an action should be maintainable. The wrong done to the aggrieved person has been done voluntarily by the first

promisor, not by the person with whom he has entered into a new agreement. It is only by transferring the doctrine of abetment from the criminal to the civil law that any colourable reason could be adduced in support of such actions. A man who induces another to commit a crime is himself a criminal in the eye of the law. But by no parity of reason could it be argued seriously that a person who induces another to give him the benefit of a contract which he had formerly promised to someone else should be answerable civilly to that third person. For, the same harm would be done to the first promisee whether the second promisee knew or did not know of his right. In the former case, on this line of reasoning, he is to have, in the latter, he is not to have, a good action. Transpose this again into the criminal law of abetment and absurdity is patent. The cases of interference with existing contractual rights in operation, such as tempting a servant away from his master during the currency of the term of service, do not fall within the definition, since the agreement is already in part executed. And for all I can see there is no reason to make an exception of cases in which after a contract for service has been made, but before it is entered upon, some one else tempts the servant to break his agreement.

Turning again to Erle J.'s dictum, so much approved later by some of the very greatest English Judges, let us see, how in that later application, it stands analysis. Procuring the violation of an existing right is a cause of action, the violation of the right is an actionable wrong. Now when the party aggrieved is seeking his remedy for the violation of his right (in the class of cases I am considering the breach of a contract) his whole action must presumably be referred to its cause. In other words, he must sue the procurer of the violation but allow the actual violator, his

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promisor, to go scot-free. It can hardly be contended that he has a two-fold remedy against both, the procurer of the breach and the breaker of the contract. Nor, I believe, would it be argued that he can sue them together jointly and severally. If he first sue his promisor for damages on the breach, what becomes of his cause of action against the procurer? And if he elect to sue the procurer of the breach, is the actual breaker of the contract to be exonerated? It may be answered that this is exactly what happens when actions for conspiracy to injure by causing others not to make contracts with the plaintiff are successful. It is not the servants and would-be customers who are sued but the conspirators who have induced them to break their contracts or withdraw their custom, &c. True, but the reason for this is simple and does not apply to such cases as I have in view. By the act of their conspiracy to injure the plaintiff, and attain that end by bringing about unlawful acts or the use of unlawful means, they have done the plaintiff a civil wrong entirely distinct and separable from the particular wrongs done him by the several persons upon whom the conspiracy has taken effect. Nothing in the least like this happens where a person knowing of the existence of a former agreement, merely takes a fresh agreement from the promisor of the former, although he knows also that doing so must involve the breach of the first agreement. Two elements at least are essential in the former action, the combination and the direction of its collective activity by means unlawful or lawful, to an unlawful end, the malicious injury of the plaintiff. In the class of cases I am dealing with, one of these elements is entirely wanting and the other can only be imported by a very large and loose expansion of the legal notion of malice. If the underlying idea is that an abettor of a civil wrong should be liable to the person suffering it, just

as in the criminal law an abettor is as punishable as the principal criminal, we need only turn to Erle J.'s dictum and the practice founded upon it to see how completely the analogy breaks down. For here the abettor and the principal are not equally liable, but one or the other is to be selected as the wrong doer, while the other, usually the principal, is absolved. The criminal abettor could not possibly procure the crime unknowingly, but the civil abettor might bring about exactly the same injury and damage to the aggrieved party to the first contract without ever having heard of him or his contract. Apart from conspiracy, which is an indictable offence and therefore a wrong in itself, it may be doubted whether the act of a single individual not prompted by malice nor supported by unlawful means, resulting in the breaking of a contract which he knew of and the making of a subsequent contract with himself for his own advantage would, in strictness, give the first promisee any cause of action against him. In this connection it has often been argued in the Courts that there can be no conspiracy to do that which, if done by one member of the conspiracy alone, would not be an actionable wrong. This entirely overlooks the fact that the conspiracy itself is a wrong. No man is to be made the object of a conspiracy, although every man is free to play for his own hand by lawful means. It must be acknowledged that some of the greatest English Judges who have refuted this argument appear to have missed the point and strayed into reasoning, which, with deference, I submit, is unsound.

Briefly, the position arrived at by this reasoning is that acts done by A B C D and X in concert and furtherance of an end, not necessarily unlawful in itself, may give the person against whom they are directed a cause of action, though, if the same acts were done by X alone, they would not; in other words, that merely

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collective action can give an act a new quality of wrongfulness, which it would not have had but for the fact that it was done by many instead of one. And the ground of reason upon which this is supported is that a man may well resist or ignore the attacks of a single man while he might be forced to succumb to the oppression of numbers. Both the reason and the conclusion, so stated, are false. Take a simple illustrative case, that of an actor complaining of a conspiracy maliciously to hiss him off the stage and so injure him in his profession. Let us suppose that there are two hundred persons in the conspiracy who have all agreed to hiss the actor as soon as he appears. Let us suppose that the entire audience consists of a thousand persons. The conspiracy being proved, and its object also being proved, namely, to injure maliciously the plaintiff, the means by which that end is attained may be wrongful in themselves or they may be not wrongful in contemplation of law. Every person attending a place of public entertainment, and honestly disapproving of any of the actors, has a right to express his disapproval by hissing. The hissing *per se* is not a wrongful act. If one of the two hundred conspirators alone hissed, this might pass unnoticed; it might do the actor no harm. According to the reasoning under consideration it would be a harmless act giving rise to no cause of action. But done in concert with hundred and ninety-nine others it is now held to be a wrongful act. This is a plain fallacy. The act does not change its character because repeated by many. If the whole two hundred, without any pre-concert, honestly hissed together, the total hissing would be as indifferent in the eye of the law as the hissing of each of them. Add the eight hundred non-conspirators making up the audience, and suppose that the whole thousand were so displeased with the actor's performance that they all hissed him, would he

have any cause of action against them? Certainly not. The wrong which is the ground of his action does not lie in the means used but in the end attained. He would be far more injured by the spontaneous and honest hissing of a thousand, than by the concerted and malicious hissing of two hundred, yet he would have no cause of action. The truth is that if the hissing of the two hundred, in furtherance of a conspiracy, was a wrongful act, then the hissing of each one of them for the same purpose would be just as wrongful an act. If the proposition is meant to apply to the wrong actually done, then it comes to no more than this, that one man might not have been able to do a wrong which many in combination might. But if the wrong were actually done by a single person with the same intent and by the use of the same means, as it might have been done by two hundred, it is impossible to find any distinction between the cases; the result in either must be the same in the eye of the law, if we eliminate the important fact that conspiracy is *per se* an offence, and so of course a material ingredient of a civil wrong. If it is lawful for X alone to induce a man not to sell his land to another, not to make a contract with another, or to exclude him from a new field of competitive enterprise, it is equally lawful for twenty or a hundred men without pre-concert or malice, to do the same. It is true that the combination of two hundred might achieve what one of their number alone could not. But this pre-supposes conspiracy. It is also true that the collective but not concerted or malicious action of two hundred might similarly achieve a result which any one of them singly would have failed to achieve. But here no one can doubt but that no action would lie against any one of them singly or all together. In the hissing case, just given, every one of the two hundred would be as liable as any other or all together

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if it could be proved, (a) that he was actuated by malice (b) that his act caused damage to the plaintiff. For this, like so many other cognate cases, is really a case of privilege in the first instance, later displaced by proof of malice. It will be found on analysis that the reasoning of all the eminent Judges who have dealt with this argument, resolves itself into this, that given a wrong aimed at, many may succeed in inflicting it where any single person would not. But this is quite a different conclusion from that I have stated, namely, that what done by a single person would not be a wrong at all would be a wrong if done by a number of persons in concert. The only possible ground for any such distinction is that the fact of combination or conspiracy is a wrong *per se*. And this is not very logical either when we turn to the ordinarily accepted definitions of "conspiracy." There could be no indictable conspiracy except to do a wrong act or use wrong means to do an act not otherwise wrong. Nor could there be any civil action for conspiracy unless, (a) a wrong act had been done or (b) wrong means had been used. Now we see *ex vi terminorum*, that in the first case there could be no valid distinction between the case of one person acting alone and the case of twenty people acting together, for to give a cause of action a wrong must have been done. And a wrong must always be a wrong whether done by one or by twenty. No case, therefore, can possibly be put under this head in which a wrong done to an individual by conspiracy would not also have been a wrong if done to him by any given member of the conspiracy. If it is wrong for fifty men to prevent servants going into A's service, it must equally be a wrong for one man to do so. But it is argued that apart from the conspiracy it is a fair fight one man against another, and no wrong would be done to A by X merely seeking to engage servants whom A desired. Neither for that matter

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would it be a wrong if done by the fifty, did not the conspiracy and the implied malice introduce new elements. If without malice and solely in his own interests X tried to corner the labour market, he would have given A no cause of action; but then neither would X plus forty-nine others. This was in effect the ground of the decision, as I understand it, in the *Mogul case*⁽¹⁾. But if the object of the fifty was malicious, merely to ruin A, and this could be shewn from the facts of the combination and its subsequent action, A might have his action. But in like circumstances I do not see why he should not have his action against X alone. The difficulty would then be to prove the malice, since there would be no starting point of a conspiracy to injure A in his trade. It would be hard indeed in such a case, as Lord Macnaghten and Lord Watson have said, to expect the Courts to pry into a defendant's soul and get at the hidden motives of conduct not unlawful in itself. And this brings us to the B category. Given an end not unlawful in itself, the means used to attain it by a single man could only be less wrongful than those employed by fifty men, because they would be less effective, in other words, would fail of attaining the desired end. It thus becomes clear that the proposition goes no further than this, that the pressure exerted by numbers might amount to coercion, which is wrongful, while the pressure exerted by one of them alone might not, and, therefore, would not be unlawful. That is not a distinction between the quality of the same act repeated by fifty persons, and the act done by one alone, but views the collective action of fifty from the standpoint of results alone as in law a different act from the act of one. In the former case it is called coercion, in the latter it is not. Yet of course there might be genuine coercion by a single person if

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he were influential enough, and then the attempted distinction disappears altogether.

I return now to my central point, where, if anywhere, can a limit be set to the application of the principle established in *Lumley v. Gye*⁽¹⁾? Logically I should say nowhere, practically I should say that it was desirable to confine that case within the narrowest possible bounds. In a later case Rigby L. J. puts such a set of facts as I am dealing with though, of course, with reference to English customs and sentiments, as a *reductio ad absurdum* of any extension of *Lumley v. Gye*⁽¹⁾ beyond its own facts. If a lady were engaged to be married to A and before the wedding X fell in love with her and induced her to break off her engagement with A and become engaged to him, would A, he asks, have any cause of action against X? Carry it a step further, and suppose that before the lady married X, A brought his action and applied for an injunction against X restraining him from pursuing his courtship, would any Court listen to him? Similarly, in *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*⁽²⁾ Joyce J., without going very deeply into the question, expresses a very strong opinion against the too liberal extension of the principle upon which *Lumley v. Gye*⁽¹⁾ appears to have been decided. He would draw a distinction between cases in which contractual relations already existing may be distinguished from unfulfilled contracts, confining the former cases to the relations existing under contracts of service between master and servant, or employer and employed. I am unable to see how any such distinction can validly be based upon the dicta of the many eminent Judges who have had to deal with this question in the English Courts. The real distinction, if one is to be drawn and maintained at all, ought to rest upon

⁽¹⁾ (1853) 22 L. J. Q. B. 463.

⁽²⁾ (1906) 76 L. J. Ch. 194.

plainer and solidier ground. I have already tried to indicate that ground.

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In all matters of private contracts the parties are supposed to be free agents accountable to each other and no one else. The promisor may break his promise with or without external inducement and the damage to the promisee is precisely the same in either case. What conceivable right then can he have against a third person on the ground that he has induced the promisor to break his promise, unless it can be shown that he has done so maliciously or by the use of unlawful means? None at all that I have been able to discover. The aggrieved party to the first contract always has his remedy against his promisor, and it is no concern of his how his promisor was brought to break his promise. It is enough that he has done so.

Perhaps some assistance might be got out of an analysis of the terms of Erle C. J.'s dictum "procuring the violation of an existing right," &c. Now in the case of a contract what is the existing right of the promisee? Ordinarily, it goes no further, merely as a legal right than damages, should the contract be broken. In some cases it goes the length of specific performance. But marriage is evidently not one of those cases. Where the contract is not of a kind of which specific performance could be granted, then the legal existing right, up to actual performance, is no more than the right to have damages for the breach. And that right cannot, of course, be violated by any one who merely induces the breach. In the very nature and essence of the thing the legal right of one party to a contract against the other is restricted to that other, and is limited to compelling him in some cases, to carry out the contract in others, to getting damages out of him should he fail to perform it. Where then all other elements

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are absent and the wrong complained of is confined to the loss occasioned to the promisee by the non-performance of his promise by the promisor, the inducement by another not to perform, whether that other was or was not aware of the existence of the contract does not, in strictness, appear to make up any part of the real cause of action. No violation of any right actually existing in the plaintiff in such an action against the inducer, has been procured by the defendant. But this is possibly too nice, since it might fairly be replied that if there were no existing right in the promisee against the promisor, to have the promise carried out, there would be no ground for the action for damages against him, and the reasoning just suggested might be thought to confound right with remedy.

On the other hand, the peremptory ruling out of all regard to the intention of the defendant insisted upon by Lords Watson and Macnaghten is open to as plain an objection. For, in fact, it never is neglected as being of the essence of the plaintiff's cause of action against such a procurer, though it is partly concealed under a looser idea. This idea too is implied in the use of such a word as "procure." In one sense a man, who tempts the owner of an article with a higher price than that for which he has already agreed to sell it, may be said to procure the breaking off of the former agreement even though he did not know of its existence. And this also exhibits the rather coarse substitution of the bare idea of knowledge for that of malicious intent. For if two persons do precisely the same act, having the same damaging and injurious consequences to a third, and one of those persons is liable to the third in law for damages on account of knowledge, while the other is not, plainly the essence of the action against the former lies in the knowledge, or in other words, in the malice which is pre-supposed in the bare knowledge.

Mere knowledge by itself could never, in an exact analysis, be such an ingredient as added to an act would convert it from a non-actionable into an actionable wrong. It is only when, to avoid difficulties of proof, such mere knowledge is presumed in law to impute malicious intent that we arrive at a true understanding of why an act not actionable alone, may be, with that ingredient added, actionable. We are thus brought back to what is undoubtedly the truth, that in every case conforming to the required conditions malice is essential to the giving of a good cause of action.

In the case put by Rigby L. J., there was the existing right, there was a procuring of its violation, and there was the requisite knowledge, which, according to Crompton L. J., is tantamount to malice, and yet no one can doubt that the party injured by the breaking of the first contract would have no cause of action against him who induced its breach. The rule then deducible from *Lumley v. Gye*⁽¹⁾ and the comments made on it in *Allen v. Flood*⁽²⁾ is not a rule of universal applicability. Any exception invalidates an universal. Probably it is untrue to impute malice to mere knowledge; the fact of knowledge may suggest the existence of malice, but it seems rather a rude generalization to say that the two are equivalent. But if they are not, and the line requires to be drawn where I have submitted that it ought to be drawn, one thing is clear, and that is that *Lumley v. Gye*⁽¹⁾ was wrongly decided. This cannot be argued now, since it was explicitly approved by the House of Lords in the later cases of *Allen v. Flood*⁽²⁾ and *Quinn v. Leathem*⁽³⁾. This much at least may be hazarded without disrespect that the universality of the rule which appears to have been established by *Lumley v. Gye*⁽¹⁾ is questionable, and that it ought not

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(1) (1853) 22 L. J. Q. B. 463. (2) [1898] A. C. 1.

(3) (1901) 85 L. T. 289.

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to be applied to any new set of facts without a Court being satisfied that it exactly fits them. I should like to say, that limiting the case before me to the plaintiffs and the first defendant (I will deal shortly with the element of conspiracy presently) it does not apply, and that, on the facts pleaded, the plaint discloses no cause of action. But in view of the state of the law at present I do not think it would be safe to do so, since it would appear from a perusal of the leading text-books that it is accepted as axiomatic that procuring the breach of a contract gives a good cause of action. I shall never be able to bring myself to believe, that without the addition of other elements, it does. I assume that the word "procuring" in this compendious phrase connotes knowledge of the existence of the contract which the defendant procures to be broken. Even so, in the absence of express malice, I do not think that looking at the development of the doctrine historically and theoretically that as an universal proposition is good law and true.

The plaintiffs have entirely failed to prove any conspiracy between the defendants *inter se* or with others not made parties to the suit. Some attempt was made to prove that the first defendant wrote to his sister Rad habai, the second defendant, on the subject of procuring a bride for him. Some attempt was made to prove that the betrothal of Jamnabai to the first defendant took place in Bombay under the auspices of the second defendant, who was well aware of the existence of the betrothal of Jamnabai to the second plaintiff. But that attempt appears to me to have failed. Nor, even had it been successful, would it have been sufficient to prove a conspiracy between the first and second defendants to procure the breaking off of the marriage arranged between Jamnabai and second plaintiff. There is absolutely nothing to show that at that time the first

defendant had any particular girl in view, or was aware of the betrothal of Jamnabai to Kanji. The first defendant has, for many years, resided permanently in Calcutta and must not be presumed to have known all that was going on in the caste in Bombay. As to the third defendant, I cannot remember that any serious attempt was ever made to connect her with this alleged conspiracy. Both, the second and third defendants, are sisters of the first defendant. Such evidence as there is of conspiracy points to a woman called Adhibai having taken the leading part. It was she who appears to have recommended Mulji, the father of the girl Jamnabai, to go to Calcutta and choose a husband for her, naming one Bhabar and the first defendant as suitable bridegrooms. But what conceivable reason had this woman Adhibai to conspire with the first defendant to procure the breaking off of Jamanbai's betrothal to the first and second plaintiff? I do not believe that there was any conspiracy or anything in the least like a conspiracy. It is possible that when the marriage between Jamnabai and Kanji hung fire so long, members of the caste may have found out or guessed that the girl's father was dissatisfied with the proposed marriage, and so suggested to him that he had better look out for a more suitable husband for his daughter. It is quite possible that up to a point what Mulji has deposed to, may be true. He may have insisted upon the punctual fulfilment of the terms of the betrothal, and the plaintiffs may have procrastinated, and so an impression got abroad that the match was broken off, as indeed Mulji swears that it was, before he opened negotiations with the first defendant.

That may account for Adhibai's intervention and suggestions. But nothing in the evidence, either direct or inferential, would warrant me in holding that a conspiracy between the defendants had been proved.

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As the plaint founds the claim on conspiracy this might be a sufficient ground for dismissing the suit.

But the separate case of the first defendant might still have to be considered, after eliminating the element of conspiracy. Did he know when he proposed to marry Jamnabai, that she was still engaged to Kanji? Was she in fact so engaged? I think that the latter question would have to be answered in the affirmative. I do not doubt that Mulji was very much dissatisfied with his prospective son-in-law, and was anxious to break off the engagement upon any pretext. But I do not believe that he had in fact broken it off when he went to Calcutta in March. Had that been the case I think he would have returned the deposit of Rs. 3,000 and the Rs. 2,500 worth of ornaments already made. This he did not do, and later the plaintiffs had to sue him for the deposit and the ornaments. But I think that he was eagerly desirous of finding a substitute for Kanji, and went to Calcutta with the express object of suggesting a marriage with the first defendant. The first defendant is a much wealthier man than either of the plaintiffs and doubtless in the opinion of Mulji a much better match for his daughter. Up to this point (apart from the evidence that Jamnabai was actually betrothed to the first defendant in Bombay with the full knowledge of Radhabai, and presumably, therefore, with the knowledge of the first defendant himself that she was at the time betrothed to Kanji) there is nothing to suggest that Narsi knew anything of the engagement of 1910 to Kanji. The Court is asked to infer that he did from what followed. It is true that the marriage and betrothal, both on the same day, in Calcutta (if as regards the betrothal, this part of the evidence for the defendant be true) with other circumstances suggest that all concerned were in the utmost haste to get the girl married to the first defendant.

The many unseemly informalities attending upon the indecent haste with which the marriage was put through on the 18th April, are strongly insisted upon on behalf of the plaintiffs as proof enough of the first defendant's knowledge. But they are at least as consistent with Mulji's desire to keep the first defendant in the dark about the previous engagement until the marriage was an accomplished fact as with the first defendant knowing of that previous engagement. It is not as though this haste enabled the marriage to be performed under the auspices and with the sanction of the Calcutta Jamat. The Jamat did not countenance the marriage. This did not deter the bridegroom, who claims to be a reformer and to care little for caste ordinances and authority. He went through with it, and as a result was out-casted. If the object of all this hurry had been to get the approval of the Calcutta Jamat before they were made aware of the fact that the bride had already been promised to another, it entirely failed of its object. The elders refused the customary fees and would have nothing to do with the affair. The suggestion is that Narsi, knowing that his bride was already promised to another, wanted to get married before the Jamat had time to put its veto on the ceremony. But since the facts show that Narsi was quite indifferent, did not care whether the Jamat sanctioned the marriage or not, the suggestion loses much of its force. On the other hand, it is, in my opinion, much more probable that Mulji was extremely anxious to obtain so good a match for his daughter and feared that should Narsi hear before the marriage that she had already been betrothed he might refuse to go on with the marriage. This would account for the haste with which everything was precipitated, and many customary decencies ignored. At the same time it would be consistent with Narsi's sworn statement that he did not know before he married Jamnabai that she was at the time engaged to

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Kanji. As to what occurred afterwards, that has little bearing on this point. The plaintiffs appealed to the Bombay Jamat, and Narsi might very well have wished to placate them, not only in order to avert the unpleasantness of being out-casted, but the much more serious prospects of heavy litigation. I do not think there is anything in the evidence as to what occurred after the marriage which would suffice, along with the inferences I have already indicated, to prove affirmatively that the first defendant knew of the existence of the engagement of 1910 to Kanji, when he married Jamnabai on the 18th April 1913.

But there is another answer to the plaintiffs' claim, which appears to me to be conclusive. It has the advantage, too, of lying outside the English law, and being unaffected by any of the English decisions. The Hindu law, by which these parties are governed, enacts that a father may break off his daughter's engagement, should a more suitable bridegroom be available. Under that law, then, the plaintiffs never had more than a conditional right to the fulfilment of the contract upon which this suit is founded. So that since it was optional with the father of the promised bride to give her to any other more eligible suitor, and such a suitor having been found before the betrothal to Kanji had been followed by his marriage to the betrothed girl, it is clear that no legal right inhering in him or his father has been violated. There can then be no cause of action for the violation of any such right either by individual procurement, or by conspiracy.

All that the plaintiffs at best had a right to, was the marriage of Jamnabai to Kanji at some future time, should a certain event not happen. It has happened, and there is an end of it.

I think that on every ground the plaintiffs' suit fails, and must be dismissed with all costs.

Attorneys for the plaintiffs : Messrs. *Madhavji, Kamdar and Chhotubhai*.

Attorneys for the defendants : Messrs. *Bhimji & Co.*

Suit dismissed.

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ORIGINAL CIVIL.

Before Mr. Justice Beaman.

JOHARMAL LADHOORAM, A FIRM, PLAINTIFFS v. CHETRAM HARISING
AND OTHERS DEFENDANTS.*

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November 26.

Hindu Law—Joint Hindu family and joint family business—Contracts by certain members of the family for the benefit of the family—Managing members—Liability of the joint family for contracts entered into by managing members.

A joint Hindu family firm must be regarded like any other joint family asset if it in fact belongs to the joint family.

If a business be carried on by the members of a joint Hindu family for the benefit of the entire family and there are members of the family who do not actively participate in the conduct of the business, particularly if such business has been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts and the liability of those members of the family not actively engaged in the conduct of the business would probably be restricted to the share of each such member in the joint Hindu family property.

In a case where one or more members of a joint Hindu family start a business of their own not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other members, the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition.

* O. C. J. Suit No. 899 of 1912.

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THIS was a suit to recover monies due in respect of certain transaction in wheat and linseed. The plaintiffs who do business in Bombay as pukka adatias alleged that under instructions from the fourth defendant, Hakamchand, who was a member of a joint Hindu family carrying on business at Barela in the name of Harising Chetram they, in or about the month of Aso Maru Samvat 1968, entered into various contracts as pukka adatias for sale and purchase of wheat and linseed for forward delivery with the said joint family firm. Hakamchand, from time to time, received from and paid to the plaintiffs monies in respect of the said contracts on behalf of his firm. On or about the 9th of the First Ashad Sud Maru Samvat 1969 the plaintiffs made up an account of their dealings with the defendants and the said account showed a sum of Rs. 6,625-12-9 payable by the defendants to the plaintiffs. The defendants did not pay this amount, hence the suit.

The first defendant in his written statement alleged that the business of the firm of Harising Chetram was carried on by himself and the second defendant on their own individual account and not for the benefit of any joint family. He denied that the third, fourth and fifth defendants were partners in the firm of Harising Chetram. As to the fourth defendant, Hakamchand, the first defendant alleged that he was a minor under the age of eighteen when these contracts were supposed to have been entered into; that he had no authority to engage the plaintiffs as pukka adatias of the firm, nor to instruct the plaintiffs to open an account in their books in the firm's name. He denied that Hakamchand had paid to and received from the plaintiffs moneys on behalf of the firm of Harising Chetram and finally without prejudice to the foregoing he alleged that the transactions in any event were gambling transactions and therefore void.

The other defendants did not file written statements.

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In evidence it transpired that the fifth defendant was the son of the first defendant and that the other four defendants were brothers.

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Wadia and *Taleyarkhan* for the plaintiffs.

Mirza for the defendants.

BEAMAN, J.:—The plaintiffs sue the five defendants as members of a joint Hindu family, trading for the purposes of these contracts in the name of Harising Chetram, for a sum of Rs. 6,625-9-6, the differences due to the plaintiffs for sales of linseed. The contracts sued upon were entered into by the fourth defendant, Hakamchand, on account, as contended by the plaintiffs, of the other defendants in the month of September 1911 for the September settlement. First and second defendants, Chetram Harising and Beniram Harising, resist the plaintiffs' claim on the ground that the family was divided shortly before these contracts were made in September 1911 and that they, the said first and second defendants, are the only partners in the firm of Harising Chetram. They deny that the fourth defendant, Hakamchand, had any authority to enter into contracts on their behalf or that they are bound by any contracts so entered into by the said Hakamchand. They further deny liability on the ground of their constituting a joint Hindu family with the other two defendants, Khubchand and Hakamchand, although they admit that the fifth defendant Kapurchand is the son of the first defendant, Chetram, and a partner in the firm of Harising Chetram. It is further admitted that Chetram, Beniram and Kapurchand now constitute a joint Hindu family as they reunited after the partition of 1911. The defendants further contend that Hakamchand was a minor at the date these contracts were made with the plaintiffs and as such he was not competent to represent

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the joint family even assuming that it had then been a joint undivided Hindu family, nor had he received any express authorisation from the managing members of the firm of Harising Chetram and Co., to act as their agent in Bombay. Lastly, the defendants contend that the contracts sued upon are wagering contracts unenforceable at law.

It is not altogether easy perhaps to define with precision what is usually meant in these Courts by a joint Hindu family firm. It appears to me that a firm must be regarded like any other joint family asset if it, in fact, belongs to the joint family; and nothing is really gained by insisting upon the peculiar character of the property and then introducing many legal notions which are appropriate rather to partnerships in the common sense than to the special concept of the joint Hindu family. It may be, and very often is, the case that a business is carried on by the members of a joint Hindu family for the benefit of the entire family. In such cases there may be many members who do not actively participate in the conduct of the business; there may be many members who are minors; and it is only by a confusion of ideas that these can be associated with those who are actively carrying on business as partners in the ordinary commercial sense. Nevertheless, if it be found, as a fact, that such a business was being carried on by any one or more members of a joint Hindu family for the benefit of the other members, particularly if such business had been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable, I think, to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and

defined in all the Courts. Again, it may be, and often is, the case that one or more members of a joint Hindu family start a business of their own, not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other members. Here it becomes clear at once that the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated with reference to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition. Great difficulties would likely be here introduced by the nucleus doctrine but with those I am not now concerned. Assuming that a joint Hindu family carries on a business by one or more of its members for the benefit of the rest of the family, which is the common case, then the liability of the other members not actively concerned in the conduct of the business would, I take it, be referable, as I have just said, to the theory of managership and would probably be restricted to the share of each such member in the joint Hindu family property. It might be doubted whether any personal liability beyond that can be attached to members of the family not actively carrying on the business, not in the commercial sense partners and, therefore, not parties to any contracts made with the firm as a firm. That is one point in which a distinction might well be drawn between what is commonly called a joint Hindu family firm and a firm in the true commercial sense. The difficulty in all cases of the kind, with which I am now dealing, arises where firms so called are started by members of a numerous joint Hindu family, many of whom afterwards repudiate liability, although if the concern turns out successful they would probably be willing enough to share in the profits. In all such cases it becomes difficult to define with precision the limits of liability attaching to members of a joint

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Hindu family who may not themselves have had any connection with the business carried on by the other members in other parts of the country in a name which is afterwards assigned by creditors to a joint family firm. And there is this distinction too, no doubt, that these family firms are very often handed down, as long as they continue to be profitable, from father to son and are really regarded in much the same light as any other joint family ancestral property.

In the present case it is not denied that the firm was established, say, thirty years ago, or thereabouts, and was carried on as a joint family concern up to the year 1911. Whether every member of the family, then alive, was actively associated with the conduct of the business, might be difficult to prove; and assuming that some were not, then the question would arise whether they were personally liable as partners in the ordinary sense, or whether taking them to be members of the family represented in the conduct of the business by the managers, they would not at least be bound by the acts of such managers to the extent of their share of this and all other joint family property in which as coparceners they had a share. I do not think that it is necessary in the present case to pursue this process of analysis further, because there does not appear to me to be any practical difficulty to be surmounted. There can be no question but that the first and second defendants used at any rate to manage the business while it was admittedly a joint ancestral family business and are still carrying it on and managing it as a firm in the same name. If, then, it can be shown, that the fourth defendant, Hakamchand, represented them in Bombay for the purposes of making these contracts with the plaintiff firm, it would necessarily follow, waiving, for a moment, the question of Hakamchand's minority, that they would be answerable to the plaintiff.

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iffs for the moneys now claimed. I understand that the first defendant is really the only substantial member of the family. Therefore, if his liability were made out, it would not matter much, I apprehend, to the plaintiffs whether or not Khubchand or Hakamchand were also made liable. Nor does the question raised of the fourth defendant's minority affect the case, viewed in this light, in the slightest degree; for, assuming that he was a minor in September 1911, yet, if he were authorized by the firm of Harising Chetram to act for them in Bombay as their agent for the purpose of making these contracts and did so act, they would be equally bound and the minority of their agent would be immaterial. It is only on the assumption that Hakamchand was not authorised by and on behalf of the first and second defendants, and that his acts were not afterwards ratified by them, that, on the footing of being a member of the joint Hindu family to which this firm belonged, it might be material to determine whether he was a minor or not at the time he made the contracts which are now sought to be enforced against all his co-parceners on the ground of their collective responsibility for the acts of any member of the joint family assuming to act in that capacity. It would, then, doubtless have to be shown that the acts were done for the benefit of the family as a whole and that Hakamchand, in so acting, had legally assumed a character of manager with authority to bind all his co-parceners. Notwithstanding a passage in Trevelyan on Minors at page 18, I confess, I should feel some doubt in holding that a minor member of a joint Hindu family could possibly act as manager for adult members or that contracts entered into by him in that capacity for the benefit of the family as a whole would necessarily be binding upon all the other members. If, again, it were the case of a joint Hindu

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family, all the members of whom were minors, then it would be less difficult to hold that the oldest minor was managing for the rest; still it appears to me his minority would remain an insuperable difficulty in the way of holding that he was either competent to contract for himself or for other minors, as incompetent in their turn to enter into contracts. If, however, there be no joint family existing in the present case, and if the fourth defendant, Hakamchand, be held not to have been acting as the agent of the first and second defendants' firm, his minority would have little bearing upon the liability of these defendants one way or the other. It might, no doubt, serve to protect him but beyond that I do not think that the question would have any material bearing upon what is substantially in controversy in this case. All this, however, may be very briefly dismissed, upon a simple finding of fact, for I have not the very least doubt, but that in September 1911, the fourth defendant, Hakamchand, was not a minor. The evidence taken on commission is, speaking generally, of little value, but I cannot neglect the deposition of the School Master, Ramchand Rao Balaji, who was the master at the school at which Hakamchand, the fourth defendant, received his education. That witness swears that he was a Master from 1886 to 1899 and that the fourth defendant, Hakamchand, came to School, as shown by the school register, in the year 1897. Now, I cannot bring myself to believe that Hakamchand could have gone to school before he was at the very least five years of age. Nor can I entertain any serious doubt, notwithstanding the many defects appearing on these registers, that the entry, showing that Hakamchand was admitted into the school in 1897, is entirely trustworthy. If, in that year, Hakamchand was five years, it is clear that he would be nineteen when these contracts were made. I think it much more probable that he was two or three years older and

that the plaintiffs are right in saying that he was at least twenty-one when he made these contracts ostensibly on behalf of the firm of Harising Chetram.

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There is next to be answered the question whether or not this firm of Harising Chetram was a part of the joint family property when the contracts were entered into, and whether, if so, those responsible for the conduct of the business were managers in the sense that their acts would bind all the other co-parceners. The defendants have set up a partition alleged to have been effected shortly before the contracts now sued upon were entered into. The evidence taken on commission is largely directed to proving this allegation. It is, in my opinion, altogether untrustworthy and deserves no credit. In the first place, all the witnesses speak to the partition or rather to the terms of the partition having been embodied in a writing. This writing was made in one of the books belonging to the firm of Harising Chetram. It is not forthcoming, and although I accepted the evidence of the first defendant for the purpose of letting in secondary evidence, I do not really, now, that all the remaining evidence in the case has been taken, believe a word of it. I do not believe that any partition of the kind alleged was made: still less do I believe that the terms were written out in a book, belonging to the firm of Harising Chetram, which has since mysteriously disappeared. Indeed, this defence is one of those characteristically dishonest defences with which every Judge sitting on this side of the Court and having experience of Marwari suits must be only too familiar. These Marwari firms whether taking the form of commercial partnerships or admittedly joint family businesses, almost invariably have recourse to repudiating liability, when their ventures turn out unfavourable, on the ground that this or that member or group of members did not belong to

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the firm, or that the transactions were unauthorizedly entered into by one single member of the firm, or if the transactions were entered into on the footing of the concern being a joint Hindu family property, that a partition had been effected and that they, the defendants, were in no way liable. This is the kind of defence which is constantly set up in these Courts in suits of this kind ; and the present appears to me to be a very typical case. The first and second defendants doubtless thought that their best chance would be to deny what they knew to be a fact that this business was really a part of the joint family property and had been managed up to and including the time when these contracts were entered into by most, if not all the surviving members of the joint family. So we have this entirely incredible story of a partition opportunely effected just before the contracts were entered into, which have turned out to be unfavourable to the firm of Harising Chetram. It is to be observed that every member of the family, that is to say, all the five defendants were adults, and that the evidence leaves little real room for doubt but that they were all actively concerned in the conduct of the business of the firm of Harising Chetram. The fifth defendant Kapurchand, son of first defendant Chetram, is himself twenty-five years of age ; and I have not the least doubt but that Hakamchand, the fourth defendant, was also an adult, and an active participant in the business of Harising Chetram in the year 1911. Now, if that were so, there would be no difficulty in making all these members of a joint Hindu family liable for the losses of the business not only to the extent of their share in the joint family property but personally as well. This is what I believe to have been the true state of affairs when the contracts were entered into.

But, assuming again for the sake of argument, that the firm of Harising Chetram was being carried on independently by the two elder brothers, Chetram and Beniram, with whom was associated the fifth defendant, Kapurchand, in the year 1911, and they were carrying it on, on the legal footing of self-acquisition, still it appears to me that they would be undoubtedly bound by the acts of Hakamchand and would be liable to the plaintiffs. The evidence is, and it is very good evidence on behalf of the plaintiffs, that Jethmal, the Moonim of the plaintiff-firm, first became acquainted with Chetram the first defendant, before these transactions had ever been entered into, in Jubbulpore. Jethmal says he goes to Jubbulpore every year to collect outstandings and he there met Chetram, the first defendant, and that he met also Hakamchand, the fourth defendant, who was with his brother Chetram, and apparently took part in such business talk as followed. It was there, according to this witness and I really see no reason to doubt him, that proposals were first made by Chetram on behalf of the firm of Harising Chetram to enter into business relations with the plaintiffs in Bombay. Naturally, seeing Hakamchand and Chetram together, the plaintiffs were the readier to entertain the proposals made in September to do business in forward linseed contracts by Hakamchand on behalf of the firm of Harising Chetram. Now, the evidence given by the plaintiff Joharmull Ladhooram on this point also appears to me to be entirely trustworthy. I see no reason to doubt the word of the two witnesses Joharmull and Jethmal when they say that Hakamchand came to them in September 1911, representing himself to be a member or agent of the firm of Harising Chetram and inviting business. The evidence is that in doing so, Hakamchand said that he would obtain ratification of the contracts from the head quarters of the firm at Bareilly :

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and this ratification was presently received by the plaintiffs in two post cards, Exhibits D and E, dated the 6th and 10th September, respectively. These post cards purport to be written by the firm of Harising Chetram and signed for that firm. They recognize the contracts entered into by Hakamchand on behalf of the firm and ratify them. The evidence of Jethmal is to the effect that the plaintiffs' procedure was, after making the contracts with Hakamchand on behalf of the firm of Harising Chetram, to send a memorandum of the contracts to that firm's head offices. That may very well have been done and is quite consistent with the despatch of the two post cards of the 6th and 10th of September. In these the writer is made to say that he has been apprised of these contracts, that he has noted them in his own books, and that he confirms them. The first defendant now stoutly contends that both these post cards are forgeries. He even goes the length of saying that he never posted any post card or any other communication at Jubbulpore in the course of his life. This is apparently a falsehood. He had considerable business at Jubbulpore, as he admits he negotiated Hundies there for transmission to merchants with whom he admittedly had dealings in Bombay. And although he says that all this business was always done in the quarter of the city called Lath Ganj where there is a post office whereas these post cards bear the postal mark of despatch from Shroff or Saraf Bazaar; it is quite plain, I think, that the only Postal District recognized there is that of Saraf Bazaar and not Lath Ganj, and I have not the slightest doubt but that the first defendant, Chetram, did despatch these post cards from Jubbulpore to the plaintiffs in Bombay. The only alternative hypothesis is that Hakamchand procured the despatch of these post cards by some friend of his own in order to enable him to enter into

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gambling transactions with the plaintiffs' firm by deluding them into the belief that he had the firm of Harising Chetram at his back, while, in fact, that firm knew nothing of his proceedings. It cannot be supposed, and it is not contended on behalf of the defendants, that these post cards have been forged by the plaintiffs or that the plaintiffs have procured the forgery of them. Then, it appears to me, in the highest degree improbable that Hakamchand should have gone the length of committing forgery or inducing his friends to commit forgery at Jubbulpore merely to induce the plaintiff-firm to give him contracts, which they would not have otherwise given him, in the hope of making gambling profits upon them. It is true that the evidence, for the plaintiffs, of identification of handwriting is really worthless. Nor do I believe Chetram's denial of his own handwriting. But I think, looking to the surrounding circumstances and probabilities, that I am quite safe in concluding that these post cards were really written by Chetram.

Now, if that be so, they amount to a complete ratification and fix the defendants' firm, that is to say, admittedly defendants 1 and 2, with the liability they have so strenuously sought to evade.

Even apart from these post cards, I should have felt no doubt whatever but that Hakamchand was acting for, and was authorised to act for, the firm of Harising Chetram. It is proved up to the hilt that he has acted as their representative in dealings with the two other large and respectable firms of Gokaldas and Haridas Premji at or about the same time, and if he was so acting on behalf of the firm of Harising Chetram in 1910 and 1911 with other firms, the already strong probabilities are converted into practical certainty that he was acting in the like character in these dealings with the plaintiffs.

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There is the last point to be considered, but I can dispose of it in a very few words. The defendants have contended that even assuming the contracts were entered into by the fourth defendant on behalf of the firm of Harising Chetram, and that, therefore, all the five defendants, or at any rate the members of that firm, would be liable for them; yet, in the present case the contracts being wagers are unenforceable at law. The only defendants who contest the claim here are the first and second defendants. As they both deny that they ever made these contracts or authorised the fourth defendant to make them, I confess, I do not see how they can possibly be in a position to contest the character of the contracts. It hardly lies in the mouth of a person to say in one and the same breath: "I did not make a contract but if I did make a contract I am sure it was a wager." That is in effect the form the defence has taken here. But waving that logical difficulty, I may say that there is no evidence worth the name, led by the defendants, to prove that the contracts sued upon were wagers. I hold that the contracts were not wagers.

I, therefore, entertain no doubt whatever but that the firm of Harising Chetram is answerable to the plaintiffs for the amount claimed. And I further hold that when that firm became so liable every one of the five defendants was a member of the joint family of which that firm was an asset and was taking an active part in the business of the firm. I, therefore, hold that all the defendants are liable to the extent of their shares in the joint family property and also liable personally.

The plaintiffs' suit must be decreed in full, against all the five defendants, with all costs throughout including all costs reserved.

Attorneys for plaintiffs :—Messrs. *Tyabji, Dayabhai & Co.*

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Attorneys for defendants :—Messrs. *Jamshetji, Rustamji & Devidas.*

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Suit decreed.

M. F. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

VIRCHAND VAJIKARANSHET (ORIGINAL PLAINTIFF), APPELLANT, v.
KONDU VALAD KASAM ATAR, MINOR BY HIS GUARDIAN *ad litem*
NAMBA VALAD HUSENBHAI ATAR, AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

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June 21.

Mortgage—Sale of mortgaged property—Suit against one of the heirs of the mortgagor—Subsequent addition of parties—Limitation Act (IX of 1908), section 22.

One K, a Mahomedan, effected a simple mortgage in favour of V on the 23rd of June 1899, the mortgage-debt becoming due on demand which was made on the 1st January 1900. K having died, a suit for sale of the mortgaged property was instituted by V against his minor son as a party in possession of the property on the 23rd of June 1911. The minor's guardian having alleged that K left other heirs, a widow and two daughters, V applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th February 1912. It was contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act, 1908. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

On appeal to the High Court by the mortgagee,

Held, that the money was specifically charged on the whole mortgaged property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

* Second Appeal No. 193 of 1914.

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The suit as originally filed was not instituted to enforce claims against shares in the hands of heirs ; it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor, and the addition of parties after the expiry of the time did not involve the dismissal of the suit under section 22 of the Limitation Act (IX of 1908).

Guruvayya v. Dattatraya,⁽¹⁾ followed.

SECOND appeal against the decision of J. D. Dikshit, District Judge, Thana, confirming the decree passed by B. N. Sanjana, Subordinate Judge, Kalyan.

This was a suit brought by the plaintiff to recover money due on a mortgage bond by sale of the property mortgaged. The bond was passed by one Kasam Atar, a Mahomedan, on the 23rd June 1899. In the bond it was stipulated that the mortgagor would return the whole amount in the month of *Margashirsha* any year that the mortgagee would demand. The demand was accordingly made on the 1st January 1900 and the mortgagor having died, the plaintiff on the 23rd January 1911 filed the suit against his minor son as a party in possession of the property. The guardian of the minor defendant having alleged that the deceased mortgagor left other heirs, namely, a widow and two daughters, the plaintiff applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th of February 1912.

The defendants all admitted the mortgage but pleaded bar of limitation as against the subsequently added defendants.

The Subordinate Judge decreed the plaintiff's claim by directing sale of the minor defendant's share alone in the mortgaged property and dismissed the suit as against the subsequently added defendants as being barred under section 22 of the Limitation Act (IX of 1908).

⁽¹⁾ (1903) 28 Bom. 11.

The District Judge confirmed the decree on appeal.

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The plaintiff appealed to the High Court.

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P. B. Shingne for the appellant :—The lower Courts erred in holding that section 22 of the Limitation Act applied to the case. The parties joined were formal and not necessary; *Khurshetbibi v. Keso Vinayek*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾ show that in this respect there is no difference between Hindu and Mahomedan law. This is a sort of administration suit where only the liability of the deceased is sought to be enforced against his own estate: see *Muttyjan v. Ahmed Ally*⁽³⁾; *Amir Dulhin v. Baij Nath Singh*⁽⁴⁾. Joinder of the parties after the period does not necessarily involve dismissal of the suit: *Gurwayya v. Dattatraya*⁽⁵⁾.

W. B. Pradhan for the respondents:—Order 34, Rule 1 of the Civil Procedure Code, 1908, has made the law more strict as to joinder of parties in mortgage suits by deleting the proviso in section 85 of the Transfer of Property Act. There is no right of representation under the Mahomedan law and the property on the death of a Mahomedan descends in different shares and is not contingent on payments of his debts. See *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh*⁽⁶⁾; *Jafri Begam v. Amir Muhammad Khan*⁽⁷⁾; *Ambashankar Harprasad v. Sayad Ali Rasul*⁽⁸⁾; *Dallu Mal v. Hari Das*⁽⁹⁾; *Bussunteram Marwary v. Kamaluddin Ahmed*⁽¹⁰⁾. The cases of *Khurshetbibi v. Keso Vinayek*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾ do not apply to the present case. They determine the rights of an auction-purchaser. The decision of *Guru-*

(1) (1887) 12 Bom. 101.

(2) (1895) 20 Bom. 338.

(3) (1882) 8 Cal. 370.

(4) (1894) 21 Cal. 311.

(5) (1903) 28 Bom. 11.

(6) (1878) 4 Cal. 142.

(7) (1885) 7 All. 822.

(8) (1894) 19 Bom. 273.

(9) (1901) 23 All. 263.

(10) (1886) 11 Cal. 421.

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vayya v. Dattatraya⁽¹⁾ relates to the joinder of plaintiffs. The view taken in that case is dissented from in *Mathewson v. Ram Kanai Singh Deb*⁽²⁾. The joinder was of necessary parties and as such section 22 of the Limitation Act applied.

SCOTT C. J.:—This suit was brought by a mortgagee under a simple mortgage to recover the amount of his claim by sale of the mortgaged property.

The mortgage was effected on the 23rd of June 1899 the mortgage-debt becoming due on demand which was made on the 1st January 1900. The suit was instituted after the death of the mortgagor, a Mahomedan, against his only son, a minor, on the 23rd of June 1911. It was, therefore, within time if properly constituted.

The plaint alleged that the mortgagor was dead, that his only heir was the defendant and that the property of the deceased was in that defendant's possession.

The defendant's guardian having alleged that the deceased left other heirs, a widow and two daughters, the plaintiff applied on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912.

It was then contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

In our opinion the judgments of the lower Courts cannot be supported.

The suit was properly brought by the plaintiff to enforce payment of money charged upon immoveable

⁽¹⁾ (1903) 28 Bom. 11.

⁽²⁾ (1909) 36 Cal. 675.

property within twelve years of the date when the money sued for became due. The money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

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A decree for sale obtained after contest in the suit as originally constituted would have been binding on the other heirs even though they had not been added: see *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾. The suit therefore was, as originally filed, one in which the plaintiff could have obtained the relief sought. It was not improperly constituted in the sense of being instituted only against one of several parties to a contract. Nor was it instituted to enforce claims against shares in the hands of heirs: it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor. As pointed out in *Guruvayya v. Dattatraya*⁽³⁾, the addition of parties after the expiry of the time for institution of the suit does not necessarily involve its dismissal under section 22. We set aside the decree of the lower Court and decree the plaintiff's claim for sale against all the defendants with all costs to be added to the mortgage-debt.

Decree reversed.

J. G. R.

(1) (1878) 4 Cal. 142.

(2) (1895) 20 Bom. 338 at p. 345.

(3) (1903) 28 Bom. 11.

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June 30.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

PRANJIVANDAS SHIVLAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 6 TO 11 AND 13) APPELLANTS V. ICHHARAM VIJBHUKHANDAS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

Hindu Law—Partition—Property to be partitioned should be taken as existing at the date of the suit—Shares taken away by some of the co-parceners before the suit not to be taken into account.

The plaintiff, as representing one branch of the family, sued the defendants who represented the other two branches, to recover by partition his share in the property which he alleged was one-third. The plaintiff had two brothers, one of whom had separated from the family by receiving his share (which then was $\frac{1}{12}$ th) some years before the suit. The defendants contended that the $\frac{1}{12}$ th share should go in reduction of the plaintiff's share at the partition, that is, he was entitled to $\frac{1}{3}$ minus $\frac{1}{12} = \frac{1}{4}$ th share. The lower Court having awarded a $\frac{1}{3}$ rd share to the plaintiff, some of the defendants appealed :—

Held, the share to which the plaintiff was entitled in the family property was $\frac{1}{3}$ rd and not $\frac{1}{4}$ th, for partition should be made *rebus sic stantibus* as on the date of the suit.

APPEAL from the decision of N. R. Majumdar, First Class Subordinate Judge at Surat.

Suit for partition.

The property to be partitioned belonged originally to one Shambhulal, who was the common ancestor of the parties. Shambhulal had five sons : Tribhovandas, Lallubhai, Lalbhai, Kasandas and Shivlal. Of these, Lallubhai separated from the family in 1885. Tribhovandas had three grandsons. Maganlal, one of them, received Rs. 20,575 in lieu of his $\frac{1}{12}$ th share of the family property and left the family in 1892. Kasandas died issueless in 1896.

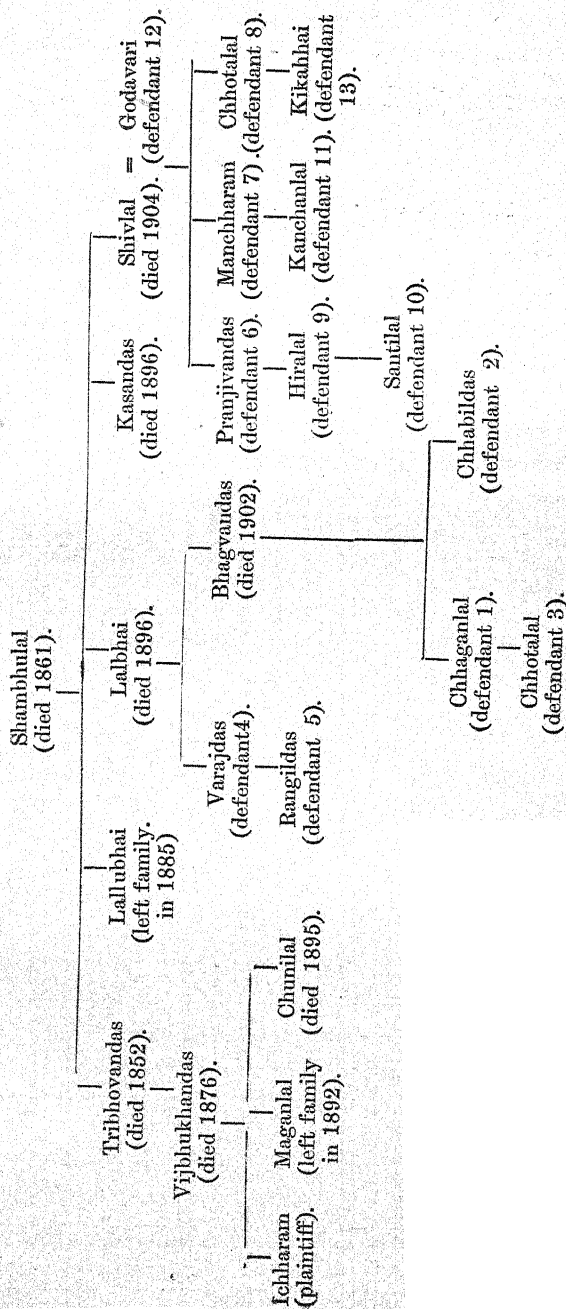
In 1911, the plaintiff as representing Tribhovandas' branch of the family sued to recover a $\frac{1}{3}$ rd share of the family property on partition with the defendants who represented Lalbhai and Shivlal's branches of the family.

* First Appeal No. 184 of 1914.

The relationship of the parties is shown by the following genealogical tree:—

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The defendants contended *inter alia* that the share taken away by Maganlal ($1/12$) in 1892 should be deducted from the share to be awarded to the plaintiff in the family property, that is, the share of the plaintiff was $1/3$ reduced by $1/12$, which was $1/4$ in the family property.

The Subordinate Judge held that the plaintiff's share in the property was $1/3$ and not $1/4$, on the following grounds :—

It is next contended that even if this be so, the share of the plaintiff is, nevertheless, less than one-third. It is argued that when Maganlal, the brother of the plaintiff, separated in 1892 the shares of the four branches must be deemed to have been determined, that at that time the plaintiff's branch was entitled to a fourth share, that Maganlal's share was, therefore, one-twelfth, that plaintiff and his other brother, Chunilal, were entitled to two shares between them, that the remaining three branches were entitled to three shares each, that on the death of Kasandas each branch including the plaintiff's branch, got one share more, and that, therefore, the plaintiff is entitled to three shares, and each of the other two branches to four shares, or in other words, that the plaintiff's share is three-elevenths and that of each of the other branches, four-elevenths. For this position reliance has been placed on the case of *Manjanatha v. Narayana*, I. L. R. 5 Mad. 362. Had an actual division taken place and a share been allotted to the plaintiff's brother, Maganlal, then undoubtedly this case would have been on all fours with the present case. But here Maganlal took a lump sum and left the family. This circumstance distinguishes the present case from the Madras case above referred to. A release, no doubt, operates, as I have already said, as a partition for some purposes ; but it is not an actual partition. This is evident from the case of *Wasantrao v. Anandrao*, 6 Bom. L. R. 925 affirmed in appeal to the Privy Council, 9 Bom. L. R. 595. There one, Vithoba, died leaving behind him surviving a son named Kashinath and two grandsons, Ganpatrao Kashinath and Madhavrao Kashinath. Madhavrao passed a release to his father for consideration. Madhavrao's son, Vasant-rao, filed a suit against Ganpatrao's son, Anandrao, after the death of Kashinath and Ganpatrao for partition. It was held that the release by Madhavrao enured for the benefit of the co-parcenary and that the shares must be determined as though Madhavrao was dead. Wasantrao was, therefore, awarded a half share. In the subsequent case of *Shivajirao v. Vasant-rao*, I. L. R. 33 Bom. 267, Madhavrao was looked upon as a co-parcener, who had elected to take his portion and receded from the family. Had the rule laid down in the Madras case been adopted, it would have been held that

at the time of the retirement of Madhavrao, the property was divisible into six shares, that one share was taken by Madhavrao, and that one share remained with Wasantrao, and two shares with Kashinath and Ganpatrao; that on the death of Kashinath, one of his two shares passed by survivorship to Wasantrao and the other to Ganpatrao, and that, therefore, Wasantrao was entitled to two shares and Ganpatrao to three shares. But as we have seen, Wasantrao was held entitled to an equal share with Anandrao. This case is, therefore, a direct authority for holding that the plaintiff's share is one-third.

Defendants representing Shival's branch appealed to the High Court.

G. S. Rao for the appellants.

H. C. Coyaji and *Rangnekar* with *H. V. Divatia*, for respondent No. 1.

N. K. Mehta, for respondent No. 2.

Mulji and Thakordas, for respondents Nos. 3, 5 and 6.

T. R. Desai, for respondent No. 4.

Rao :—The plaintiff's share is one-fourth and not one-third. The share taken by Maganlal from the joint property should be set off against plaintiff's share, that is, his share is one-third reduced by one-twelfth which equals one-fourth. See *Manjanatha v. Narayana*⁽¹⁾; Mayne's Hindu Law, section 473; Trevelyan's Hindu Family Law, p. 325; Smriti Chandrika, Chap. XII, section 4; Mitakshara, Chap. I, sections 3, 5; Mayukha, Chap IV, section 4, pl. 17-21.

The case of *Wasantrao v. Anandrao*⁽²⁾ is distinguishable for the release there was proved to be bogus.

Coyaji :—The property to be partitioned should be taken as existing on the date of partition. The shares taken by some of the co-parceners who separated years before the partition cannot be taken into account: *Gavrishankar Parabhuram v. Atmaram Rajaram*⁽³⁾;

(1) (1882) 5 Mad. 362.

(2) (1904) 6 Bom. L. R. 925.

(3) (1893) 18 Bom. 611.

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Ram Pershad Singh v. Lakhpati Koer⁽¹⁾; *Balabux v. Rukhmabai*⁽²⁾; and *Anandibai v. Hari Subu Pai*; ⁽³⁾ The case of *Manjanatha v. Narayana* ⁽⁴⁾ must be taken as overruled by *Balabux v. Rukhmabai* ⁽²⁾. It is not referred in late cases: *Sudarsanam Maistri v. Narasimhulu Maistri*⁽⁵⁾; *Ranganatha Rao v. Narayanasami Naicker*⁽⁶⁾. See also Trevelyan's Hindu Family Law, p. 337.

BATCHELOR, J.:—This is an appeal brought from a preliminary decree made by the learned Subordinate Judge of Surat in a suit for partition. The appeal is brought by the defendants Nos. 6 to 11 and 13 who are represented before us by Diwan Bahadur G. S. Rao.

The genealogical tree of the parties, which is requisite to an understanding of the points involved, is set out at the beginning of the judgment of the lower Court and need not now be repeated. The main argument on behalf of the appellants has been that the plaintiff's share in the family property should be only $\frac{1}{4}$ th and not $\frac{1}{3}$ rd as the learned Judge below has decided. As there are now existing only three branches descended from the original ancestor, Shambhulal, it is clear, and is admitted, that if partition is to be made having regard only to the present state of the family, the plaintiff is entitled to $\frac{1}{3}$ rd. But, says Mr. Rao, his claim is reduced to $\frac{1}{4}$ th owing to the circumstance that in 1892 his brother Magan separated from the family, and took away with him a $\frac{1}{12}$ th share of the family property. The whole question really involved in this argument is, whether partition is now to be enforced in accordance with the existing condition of the family, or whether, in enforcing partition now, regard is to be

(1) (1902) 30 Cal. 231.

(2) (1903) 30 Cal. 725.

(3) (1911) 35 Bom. 293.

(4) (1882) 5 Mad. 362.

(5) (1901) 25 Mad. 149.

(6) (1908) 31 Mad. 482.

had to an allowance made for a share withdrawn by one member of the plaintiff's branch of the family, Magan, when he seceded from the coparcenary in 1892. Mr. Rao contends that allowance must be made for Magan's withdrawal of the $\frac{1}{12}$ th share, and the argument is that partition is primarily *per stirpes* and is *per capita* only among the members of any particular branch and, therefore, that in allotting now its appropriate share to any one branch the Court should reckon with any portion of the joint property which has already fallen to the share of that branch. In the particular case before us the argument works out in this way, that since the plaintiff's branch in the person of Magan has already received $\frac{1}{12}$ th of the property, the present twelve shares must be distributed among the three branches with due regard to the $\frac{1}{12}$ th already acquired by the plaintiff's branch, that is to say, since $\frac{1}{12}$ th has already gone to the plaintiff's branch, plaintiff is now entitled not to the $\frac{1}{3}$ rd which he would ordinarily receive, but to the $\frac{1}{3}$ rd minus the $\frac{1}{12}$ th, in other words $\frac{1}{4}$ th. In support of this argument reliance is placed upon the decision in *Manjanatha v. Narayana*⁽¹⁾. That case was quoted before the learned Judge below, but he avoided its authority, first, because he regarded it as distinguishable on its facts from our present case, and, secondly, because he was of opinion that in *Wasantrao v. Anandrao*⁽²⁾ a Bench of this Court had adopted the contrary opinion. It seems to me, however, clear that *Wasantrao's case*, has no bearing upon the present question. For, first, the point now before us was never suggested in *Wasantrao's case*, nor was it considered by the Court, and, secondly, the decision of this Court rested on the ratio that Madhav who had released his share must be regarded as having died, so that his share lapsed to the family.

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Wasantrao's case, therefore, being laid out of consideration as of no relevance to our present facts, we are left with *Manjanatha v. Narayana*⁽¹⁾ as the only direct authority. I am unable to agree with the learned Subordinate Judge that this case can be fairly distinguished from the case now before us. On the contrary, it seems to me that the facts in the Madras case were essentially the same as those with which we have to deal, and if the Madras decision is accepted as good Hindu Law applicable also to this Presidency, then I have no doubt that the appellants ought to succeed on this point.

The genealogy of the parties and their relative position in the Madras case are set out in the judgment of the lower Court and may also be gathered from the report in the Madras Series. I will not, therefore, encumber this judgment by repeating them. It is enough to say that at a partition made in 1867 seven 1/12th shares were allotted to various members of the family, and there were left five 1/12th shares in the possession of Ramkrishna, Manjanatha and Narayan II. Ramkrishna having died, Manjanatha brought a suit for partition. It was held by the Madras High Court that he was entitled to three of the five 1/12th shares left and that Narayana II was entitled only to the remaining two shares. That decision was arrived at, as I understand the judgment, because the learned Judges held (1) that in 1867 there was no disruption of the joint family, but only a separation by certain members, the others continuing joint after as before this event; (2) that the rule directing division primarily *per stirpes* and secondly *per capita* inside each branch applies only where all the coparceners desire partition at one and the same time; and, (3) that since the two brothers of Manjanatha had in 1867 taken together three 1/12ths shares, each taking 1½ such shares, therefore the plaint-

⁽¹⁾ (1882) 5 Mad. 362.

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iff Manjanatha should get three shares, $1\frac{1}{2}$ in his own right and $1\frac{1}{2}$ as representing his deceased father, so that Narayan II could only get two of these $1/12$ th shares. Narayan II, it should be said, had contended that the distribution should be equal as things stood at the date of suit, so that the plaintiff, Manjanatha, should receive $2\frac{1}{2}$ shares out of the five. But this contention was disallowed, because, as I have explained, the learned Judges decided that regard must be had to the share which had already gone to the plaintiff Manjanatha's branch. Now if we apply this reasoning to the facts before us, we start with this, that in 1892 the present plaintiff's branch in the person of Magan received a $1/12$ th share. That must remain to the debit of the plaintiff's branch, and consequently the plaintiff's present claim cannot exceed the $\frac{1}{3}$ rd to which he would ordinarily be entitled minus the $1/12$ th which his branch had already taken. In other words, upon the reasoning adopted in the Madras judgment the appellants are right in saying that the plaintiff's present claim cannot exceed a $\frac{1}{4}$ th share. The learned Subordinate Judge, I think, was mistaken in supposing that the Madras judgment was based on the view that in 1867 there had been an actual or general division among Manjanatha's ancestors. On the contrary the Court held that the members, who did not separate from the coparcenary in 1867, continued throughout to form a joint family. That is identically the case here where both parties agree, and where the learned Judge below has found, as a fact, that when Magan separated in 1892, the other members did not divide but continued as a joint family both before and after 1892. In view of the Privy Council's judgment in *Balabux v Rukhmabai* ^(a) it is clear that this is the position which must be accepted for the determination of our present

^(a) (1903) 30 Cal. 725.

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case. I must not be taken as suggesting that the decision of this appeal would be different even if the other members had to be regarded as reunited coparceners after 1892. I mention that their status continued joint only in order to show that in this respect also the facts in the Madras case were the same as those now before us.

The simple question, therefore, is, whether we should follow the decision in *Manjanatha's case*⁽¹⁾. It is not binding on us, but it is deserving of all respect both on account of the learned Judges who delivered that judgment and on account of one's natural anxiety to avoid, if possible, any difference of judicial opinion on a question of law affecting rights of property. But with every wish to follow the view which commended itself to the learned Judges in Madras I find myself compelled to prefer the other opinion.

In explaining the grounds upon which my view is based, I desire to say, first, that so far as concerns this Presidency the Madras rule is to be supported only on the grounds of apparent arithmetical equality and depends on no text or specific principle of Hindu Law. For, the Hindu text which the learned Judges in Madras called in aid of their decision was from the *Smriti Chandrika*, a work of no direct authority in this Presidency; whereas the work which is of authority in this case from Gujarat, viz., the *Vyavahara Mayukha*, lays down exactly the contrary rule to that which has been prescribed in the *Smriti Chandrika*. For, the rule of the *Mayukha* is that in a partition between reunited coparceners the shares are equal, notwithstanding that the portions brought in on reunion are unequal: See West and Buhler, pages 783 and 784. As I have already said, the parties here

⁽¹⁾ (1892) 5 Mad. 362.

are not to be regarded as reunited coparceners, but in so far as any analogy is to be drawn from the position which reunited coparceners would occupy in a similar state of facts, that analogy is clearly adverse to the appellants.

Next I venture to doubt whether the apparent arithmetic equality secured by the Madras rule is a sufficient ground for the promulgation of such a general principle. For, though in one view the rule would work equitably, and did work equitably, in the particular facts of the Madras case, it is not difficult to imagine circumstances in which its working would be inequitable, as for instance, where, after the first separation, the members of the family who remained joint largely increased the wealth of the family by their own industry. I think, therefore, that such a rule as I am considering is hardly an adequate reason to depart from the ordinary rule that partition should be made *rebus sic stantibus* as on the date of suit. There is no direct authority for this opinion in the Bombay reports, but in a somewhat similar case expression was given to similar principle in *Konerrav v. Gurrao*.⁽¹⁾ Further, in my opinion, the peculiar legal system of the joint Hindu family should not be invaded or disturbed by unauthorized rules in pursuit of a doubtful equality. It must be remembered that in all such cases where one member separates and the others continue joint, those who continue joint do so at their own risk. Their position may improve or may suffer owing to any one of many chances, and the check on fortune introduced by the adoption of the Madras rule seems to me insignificant when compared with the risks and chances which must inevitably be accepted by those who elect to remain joint. And in this context I would observe that it seems to me a mistake to suppose that financial

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considerations are anything but a subsidiary point in the preservation of the Hindu system of the joint family. If all the members of a Hindu joint family were bent solely or principally each on his own financial betterment, the system could not, I suppose, survive very long. For these reasons I think that there is no general principle or consideration which can be appealed to in support of the rule adopted in Madras; and with unaffected respect I cannot but think that that rule cannot be reconciled with the legal principle which underlies the joint family system. That principle was stated in language now become familiar by the Privy Council in the judgment in *Appovier v. Rama Subba Aiyar* ⁽¹⁾ in the following words:—"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." But the reasoning in the Madras case seems to me to proceed, and necessarily to proceed, upon the footing that the shares mentally ascertained at the first separation have ever since remained fixed and definite, so that throughout the intervening years before institution of the suit for partition, it can be predicated of each member of the joint family that he owned such and such a definite share of the joint family property. That, I respectfully think, is not in accordance with the principle, which rather invites the inference that when once the separating member retires with his share, the retirement becomes an accomplished fact whose influence is spent at the time, so that the joint members and their fortunes are no longer to be influenced by the incident. As I have indicated, that would be the case under the law prevailing in this Presidency, if the family had separated and reunited

(1) (1866) 11 Moo. I. A. 75 at p. 89.

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in 1892, and the case in favour of equal shares at the time of suit appears to me to be still stronger where there has never been any general partition of the family, but all except the seceding member have continued joint. On this ground I am of opinion with very great respect that we ought not to give effect to the decision in *Manjanatha's case*⁽¹⁾ and that the appellants, who, upon this point rely wholly upon that decision, ought not to succeed. It may be worth mentioning in concluding this part of the case that it is admitted that in the distribution made of moveable property among these parties in 1898, and at all times up to the time of the institution of the suit, all the parties involved in this litigation have agreed in regarding the plaintiff as entitled to a $\frac{1}{3}$ rd share and in acting on that belief. I mention this not by way of suggesting that the appellants are in any way estopped by such conduct, but as indicating that the view which we are now taking is the view which naturally commends itself to a well-to-do Hindu family, and that the Madras rule which we are discarding would be novel and unfamiliar to that family.

[His Lordship next dealt with other points arising in the appeal and dismissed the appeal.]

HAYWARD, J.:—The plaintiff representing one branch, viz., Tribhovan's branch, sued defendants representing two other branches, viz., Lalbhai's and Shivilal's branches, to obtain $\frac{1}{3}$ rd share in the family estate by partition. The defendants pleaded as to the share claimed (1) an ancestor's will limiting the share to Rs. 25,000 alleged to have already been paid, (2) a previous partition limiting the share to what it would have been at the withdrawal of Lalbhai, the sole representative of another branch, and (3) a previous partition limiting the share to what it would have been at the withdrawal

⁽¹⁾ (1882) 5 Mad. 362

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of Maganlal, another member of Tribhovan's branch. The defendants pleaded as to the property to be divided, (1) that the plaintiff's residential house and certain ornaments should be brought into hotch-potch as belonging to the joint family, and (2) that the moveable and immoveable property of the deceased Kasandas, the sole representative of yet another branch, should not be brought into hotch-potch as it was the separate property of Kasandas and did not belong to the joint family.

The Subordinate Judge held as to the share claimed that the plaintiff was entitled to $\frac{1}{3}$ rd, and as to the property to be divided that the plaintiff's house and ornaments should not, but that Kasandas' moveable and immoveable property should, be brought into hotch-potch as part of the joint family estate.

This appeal is brought by the representatives of Shivilal's branch contending that the share claimed should be not $\frac{1}{3}$ rd but $\frac{1}{4}$ th only and that the plaintiff's house should, but the moveables of Kasandas should not, be included in the division as joint family property.

Now as to the share claimed, the first plea based on the ancestor's will and the second plea based on the previous partition and withdrawal of Lalbhai have been dropped and as regards the third plea based on the partition and withdrawal of Maganlal it has been admitted by both parties that after that withdrawal the remaining members of the family continued to be joint and were not in the position of separated parceners who had reunited. It was argued at the trial on this third plea that the plaintiff's branch was entitled to a $\frac{3}{11}$ ths share, viz., two shares left out of the three shares due to it at the withdrawal of Maganlal plus one share subsequently due to it as one of the surviving branches out of the share of the deceased Kasandas' branch and that

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defendants' two branches were each entitled to $\frac{4}{11}$ ths, that is to say, the three shares each due to them at the withdrawal of Magan plus one share each subsequently due to them as surviving branches out of the share of the deceased Kasandas' branch. Plaintiff's branch was thus argued to be entitled to three shares and each of the defendants' branches to four shares out of the total of eleven shares for division. But in this appeal Mr. Rao who has the support of Lalbhai's branch and represents directly Shivilal's branch has urged that the share should not be $\frac{3}{11}$ ths but should be $\frac{1}{4}$ th or $\frac{3}{12}$ ths. He has put it in this way that the share should be $\frac{1}{3}$ rd as *prima facie* due at the division of the three remaining branches less $\frac{1}{12}$ th withdrawn by Maganlal, one of the members of the branch now seeking partition, that is to say, $\frac{1}{3}$ rd minus $\frac{1}{12}$ th which is $\frac{1}{4}$ th or $\frac{3}{12}$ th. It is argued that the defendants' branches, that is to say, Lalbhai's and Shivilal's branches, should be allowed to divide between them the remaining $\frac{3}{4}$ ths or $\frac{9}{12}$ ths. This contention is based on the alleged necessity of preserving equal shares to each of the three branches as explained thus by Muttusami Ayyar J.:—"The rule that, as between different branches, division should be by the stock... is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principle that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares," and again in another passage, "At the first partial division, allotments due to the other coparceners were determined by an act of the mind for the purpose of computing the shares which were allotted to those who desired to separate, and in the same manner the allotments made at the first partition should be taken into account in calculating the shares to be awarded at the second in order that unequal partition, which is forbidden by law, may be avoided. This view is confirmed by the

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Smriti Chandrika, in which it is said with reference to a second partition among reunited parceners, that the shares may be unequal where the common wealth was at the time of reunion made up of disproportionate contributions, and that the inequality must be proportionate to the extent of the contribution made by each parcenter at the time of reunion." These passages occur at pages 364 and 365 of the judgment in the case of *Manjanatha v. Narayana*⁽¹⁾.

It seems to me necessary to examine the rule here laid down with special care, as though it was laid down a number of years ago, it does not appear to have been since referred to in any subsequent case in Madras, and no similar case has been reported from this Presidency or from any of the other Courts in India. My first observation on this case is this that the rule as laid down for Madras would not ordinarily be necessary in this Presidency. It was apparently framed to prevent inequality where sons enforce partition from their father and joint uncles. Such partition might apparently be enforced in Madras, but here it could only occur by common agreement with full knowledge of the consequences. For, it is a well established rule that sons cannot enforce partition against their fathers and joint uncles in this Presidency. My second observation is this: that with due deference to the opinion of the learned Judges who decided the case in Madras, it would not appear that the rule they have laid down would necessarily maintain the desired equality. If, for instance, the 3/11th share argued for in this case at the trial were given, then it is true that the branch would receive its full share as one of the surviving branches to the deceased Kasandas' branch. But if, as now argued here, only $\frac{1}{4}$ th or 3/12ths were given, then not only would the share taken by one member

(1) (1882) 5 Mad. 362.

Magan be deducted, but the branch would also be deprived of its full $\frac{1}{3}$ rd or $\frac{4}{12}$ th share as one of the three surviving branches to the share of the deceased Kasandas' branch. It is also not difficult to imagine other cases in which the rule would result in serious inequality. For instance, if one member of a branch withdrew part of the share of the branch and the other member left were subsequently to die, the remainder of the share of the branch would survive to the other branches. The result would be that the branch would not have got its full share. The remainder of that share would have gone to swell the shares of the other branches. Again, if one member of a branch were to withdraw while the family was poor, then that branch would never under the rule be allowed its full share of the subsequently accumulated wealth of the family obtained by the united efforts of all the branches. My third observation is that the learned Judges who decided the Madras case appear to have based their rule in part, at all events, on the equality of spiritual benefits to be conferred by the various branches, whereas little weight can be given to the doctrine of religious efficacy in this Presidency as pointed out by Mayne in his work on Hindu Law in para. 3 at page 2 and para. 509 at page 711 of the 8th Edition. My fourth observation on the Madras judgment is this: that it sought confirmation from the analogy of a partition between reunited brothers, as prescribed by the passage already quoted from the Smriti Chandrika occurring in Chapter XII, para. 4, of that work. But that authority is only an authority in Southern India (see paras. 27 and 28 of Mayne's Hindu Law at pages 28 and 29 of the 8th Edition) and has been expressly dissented from by the Mayukha the authority recognised in Gujarat. This is the passage from the Mayukha: "Here some say that the unequal distribution being negatived by the phrase 'the shares

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must in that case be equal,' the prohibition of the 'eldest son's right' is repeated for the sake of making it clearly understood that although there is to be no inequality in making up the share of the eldest, yet in the distribution the shares may be even unequal, when made up of greater and lesser shares at the time of reuniting the property. But since the term 'eldest son's right' and the like is merely a declaration of the general meaning, therefore, if the contributions to the wealth were greater and less, still the share of each must be equal. And the same is the popular practice. Hence as the foundation of the practice is derived from this text, any supposition of a declaration contrary thereto is at variance with reason. For, another author says: 'The body of the law, like grammar, for the most part, is based on usage' in Chapter IV, section 9, paras. 2 and 3 of that work. This has also been pointed out by West and Buhler, Volume 2, Book 2, para. 7A (1) (c). It seems to me, therefore, that whatever force the rule might have, as laid down by the learned Judges for Madras, it could not properly be applied to this case which comes from Gujarat. And it is significant that the rule was not applied by the parties in the year 1898 when they made a division into three shares of part of the moveable property and again in 1906 when they divided into three shares the sale profits of part of the immoveable property between the three branches of the family. The third share has, in my opinion, therefore, been rightly held to be the share to be given on the division of the remainder of the family property.

It seems to me, indeed, impracticable to frame any rule which would ensure absolute equality for all circumstances and for all branches and no *a priori* reason has been shown for applying the Madras rule to this Presidency. Nor have any texts been found in support of framing any such rule or departing from the general

rule laid down by Lord Westbury : "According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share" in *Appovier's case*⁽¹⁾ and further stated thus : "The position of any particular...person will be very important when the time for partition arrives, because it will determine the share to which he is then entitled. But until that time arrives, he can never say, I am entitled to such a definite portion of the property ; because next year the ...division might be much smaller, and the year after much larger, as births or deaths supervene" in Mayne's Hindu Law, para 270 at page 340 of the 8th Edition. [The rest of the judgment delivered by his Lordship is not material to this report.]

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the Trial Judge with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal.

In making these observations, their Lordships said they had no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wished to point out that where the issue is simple and straightforward, and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded.

Cross-examination to credit is necessarily irrelevant to any issue in the action; its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy. "It is most relevant in a case", their Lordships said, "like the present where everything depends on the Judge's belief or disbelief in the witness's story: and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow."

On the evidence in the case their Lordships reversed the decision of the Appellate Court, and upheld that of the Trial Judge.

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BHAGDARI AND NARWADARI TENURES ACT (BOM. ACT V OF 1862),

SEC. 3—*Unrecognised sub-division of a bhag—Mortgage—Covenant in the mortgage-deed—Claim for compensation based on covenant maintainable—Indian Contract Act (IX of 1872), section 65—Specific Relief Act (I of 1877), section 38—Mortgagor holding as tenant of mortgagee for upwards of twelve years—Adverse possession of limited interest.] In 1897, the house in suit and certain other properties were mortgaged to the plaintiff's father by the defendants, they having purchased the properties from the bhagdar owner in 1893. In 1901, on accounts being taken, part of the property was sold to pay part of the mortgage debt, while the balance of the debt was secured by a fresh mortgage of the house in suit. The deed of mortgage contained a covenant in the following terms:—*

"If there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced." Ever since 1897 the defendants held the house as plaintiff's tenants under yearly rent-notes, the last of which was passed on 20th June 1903. At the termination of the last rent-note, that is in July 1909, the defendants refused to surrender possession to the plaintiff. On the 9th November 1910, the

plaintiff sued to recover possession of the house or in the alternative Rs. 749 as compensation. The defendants contended that both the mortgage and rent-notes were void under the Bhagadari Act and that the suit was barred by limitation. The lower Courts upheld these contentions and dismissed the suit. The plaintiff having appealed:—

Held, (1) that the mortgage as well as the rent-notes were void under the provisions of Bhagadari Act, 1862;

(2) that, so far as the contract of mortgage was concerned, the consideration failed *ab initio*, and the money advanced by the plaintiff being money received by the defendants for the plaintiff's use, the suit to recover it was barred under Article 62 of the Limitation Act;

(3) that, although the mortgage was void under the Bhagadari Act, it was open to the plaintiff to claim under the covenant contained in the mortgage-deed;

(4) that the plaintiff's possession from February 1897 to July 1909 gave him an absolute title to the limited interest as mortgagee and so justified his claim under the covenant for compensation for disturbance;

(5) that the claim under the covenant was within time for the breach of the covenant did not occur till 1909 when the defendants refused, on demand, to surrender possession.

JAYERBHAI JORABHAI v. GORDHAN NARSI

...(1914) 39 Bom. 358

BOMBAY CITY LAND REVENUE ACT (BOM. ACT II OF 1876), SECS. 30, 35, 39, 40—*Certified extracts of Rent Roll of "quit and ground rent" land—Office of Collector of Bombay—Statements therein as to nature of tenure of land—Suit by mortgagee relying on such extracts and advancing money on title there disclosed against Secretary of State—Act only for administration and collection of revenue—No estoppel created in matters of title—"Sanadi" tenure.*] The Bombay City Land Revenue Act (Bombay Act II of 1876) makes provision for the administration and collection of land revenue in the City of Bombay. It is for this purpose only that it sets up machinery, namely, to ascertain who is liable to pay revenue. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title which is to supersede other means of conveying or registering the title to land, or to relieve purchasers or mortgagees from the ordinary obligations to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the Act, nor the character of the officials who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed, and do not purport to be decisions either of the rights of Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

Where, therefore, the appellants, in a suit against the respondent claimed that they had advanced money on mortgage relying on statements in certified extracts from the Rent Roll of "quit and ground rent" land kept in accordance with the provisions of the said Act in the office of the Collector of Bombay to the effect that the land was of "quit and ground rent," and not of "Sanadi" tenure, and therefore not liable to be resumed by the Government,

Held, that the respondent was not estopped by such certified extracts from treating the land as being of "Sanadi" tenure, and liable to resumption.

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MUNICIPAL COMMITTEE OF NASIK CITY v. THE COLLECTOR OF NASIK
(1915) 39 Bom. 422

—SEC. 11—*Suit for declaration and recovery of possession—Defence of res judicata—Parties not adequately represented in the former suit and suit not fully tried—No bar of res judicata.]* A suit brought by three plaintiffs as surviving co-parceners of a joint Hindu family for a declaration that the property in suit formed part of the joint family property and for possession was met by the plea of *res judicata*.

The previous suit, the decision in which was set up as *res judicata*, was filed in the year 1909 by the father of the present plaintiffs 2 and 3, who were minors and who were not joined as parties, against the present defendants and the present plaintiff 1 as defendant 4. The relief claimed in that suit was the same as that claimed in the present suit. The finding in that suit showed conclusively that

the father of the present plaintiffs 2 and 3, who were then minors and were not parties, did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed.

Held, that the bar of *res judicata* did not arise as the present plaintiffs 2 and 3 were then minors and were not adequately represented.

Held further, that the present plaintiff 1, who was defendant 4 in the former suit, was no more than a *pro forma* defendant and took no active part and was not bound by the result of that suit the decree in which was in his favour.

Raja Rampal Singh v. Ram Ghulam Singh (1904) L. R. 32 I. A. 17, distinguished.

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...(1914) 39 Bom. 29

CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 11 AND 47—*Mortgage debt—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of sections 11 and 47 of the Civil Procedure Code (Act V of 1908).*] The defendant in a suit for sale under a mortgage-decree, who is given six months time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property, is not in a position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. If he does not pay within six months and the mortgagee does not apply for decree absolute, the latter does not get rid of the relationship of mortgagor and mortgagee and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption but he cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt up to the date of that decree.

Such a suit for redemption is not barred either under section 11 or section 47 of the Civil Procedure Code (Act V of 1908).

RAMA v. BHAGCHAND

...(1914) 39 Bom. 41

SEC. 11, EXPL. IV, ORDER II,

RULE 2—*Dekkhan Agriculturists' Relief Act (XVII of 1879), secs. 12 and 13—Prior and subsequent mortgages upon the same property by the same mortgagor to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—Res judicata—Finding as a matter of fact that the two mortgages had been transactions "out of which the suit has arisen."*] A mortgagee, who has two mortgages of different dates upon the same property, having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage, cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct. This rule is not the result of Order II, Rule 2 of the Civil Procedure Code (Act V of 1908), but it depends upon the principle of *res judicata*.

Per Hayward, J.—If the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen," the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of Order II, Rule 2 of the Code and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

DHONDO RAMCHANDRA v. BHIKAJI

... (1914) 39 Bom. 138

CIVIL PROCEDURE CODE (ACT V OF 1903), SEC. 48—*Civil Procedure Code (Act XIV of 1882), sec. 230—Limitation Act (IX of 1903), Article 182—Decree upon a compromise—Payment by instalments—Default—Execution—minority of the legal representatives of the judgment-creditor—Step-in-aid of execution—Execution barred by the lapse of twelve years.* An instalment decree upon a compromise provided that upon default the judgment-creditor was entitled to possession of certain property. The decree was dated the 29th July 1884 and default in the payment of instalment was made in 1892. Thereupon the judgment-creditor applied for the execution of the decree. He died in 1898 and the execution proceedings were continued by his brother as his representative. In March 1902 the brother also died leaving minor sons. On the 27th June 1902 the guardian or the next friend of the minors applied to have the minors brought on the record as representing their father for continuing the execution proceedings. This application was rejected in September 1902 and the original application for execution which was presented by the judgment-creditor on default was also struck off. On the 1st September 1909 a fresh application to execute the original decree was presented by the minor sons of the judgment-creditor's said brother, one of the minors having in the meanwhile attained majority.

The application was met by the objection that as it was made after the expiration of twelve years from the date of the default mentioned in the consent decree sought to be executed, it was barred by section 48 of the Civil Procedure Code (Act V of 1903).

Held, that the fresh application was time-barred as being made twelve years after the date of the default. Article 182 of the Limitation Act (IX of 1903) showed that the fresh periods which could be obtained under the provisions of that article did not escape the provisions of section 48 of the Civil Procedure Code (Act V of 1903).

Section 48 of the Civil Procedure Code (Act V of 1903) is more extensive in its application than section 230 of the Code of 1882 and it is wide enough to cover the compromise decree of which execution was sought.

BALARAM VITHALCHAND v. MARUTI

...(1914) 39 Bom. 256

—SEC. 92—*Suit regarding public charitable property—Consent by Collector—Conditional consent.* A suit was brought in the name of two plaintiffs for the removal of trustees, for a declaration that the property in the hands of the trustees belonged to the Darga of Pir Saheb, and to recover possession of the property. Before the institution of the suit one of the plaintiffs applied to the Collector of the District for permission to file the suit under section 92 of the Civil Procedure Code of 1903. The Collector replied as follows:—"The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92 which the Court may deem fit to grant." The trying Court was of opinion that the above certificate was defective in form and therefore dismissed the suit. The plaintiffs having appealed:

Held, dismissing the appeal, that the Collector had not acted in the manner provided by section 92 of the Civil Procedure Code of 1903. He had not indicated on the proceedings that the suit was filed with his consent and that he had not even come to a conclusion that the suit was one which should have been filed.

The Collector acting under section 93 of the Civil Procedure Code had no right to consent to the institution of a suit by two persons claiming to have an interest in the trust unless it was such a suit as he would consider himself to be justified in filing at the relation of such two persons in his own name.

The provisions of section 92 of the Civil Procedure Code must be regarded as imperative.

SULEMAN HAJI USMAN v. SHAIKH ISMAIL

...(1915) 39 Bom. 580

CIVIL PROCEDURE CODE (ACT V OF 1908). SEC. 97—*Preliminary decree—Appeal—Decision that suit not barred as caste question.*] A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of section 97 of the Civil Procedure Code (Act V of 1908).

Siddhanath Dhonddev v. Ganesh Govind (1912) 37 Bom. 60, overruled.

Narayan Balkrishna v. Gopal Jiv Ghadi (1914) 38 Bom. 392, dissented from. —

CHANMALSWAMI v. GANGADHARAPPA ... (1914) 39 Bom. 339

SEC. 97—*Preliminary decree—Appeal—Decision as to res judicata.*] A decision that a matter is not *res judicata* is not a preliminary decree.

Chanmalswami v. Gangadharappa (1914) 39 Bom. 339, followed.

BHARMA BIN SHIDAPPA v. BHAMAGAYDA ... (1915) 39 Bom. 421

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See SPECIFIC RELIEF ACT (I OF 1877), SEC. 39 ... 149

ORDER VIII, RULE 6—*Suit by an Inamdar against a Khatedar for recovery of sums—Set-off claimed in a capacity different from that in suit not allowable.*] In a suit brought by an Inamdar against a Khatedar for recovery of dues in respect of certain immoveable property payable by the Khatedar, the defendant, as a *pujari* (worshipper), claimed to set off the stipend payable to him by the plaintiff.

Held, that the defendant could not claim the set-off which was due to him in a different capacity from that in which he held as tenant or Khatedar of the plaintiff.

MADHAVRAO MORESHVAR v. RAMA KALU .. (1914) 39 Bom. 131

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—————*Indian Companies Act (VI of 1882), secs. 128, 129—Compulsory winding up—Creditor's petition—Company's inability to pay its debts.*] The petitioner who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager, demanded payment from the Company. The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The petitioner thereupon applied to the Court to compulsorily wind up the affairs of the Company. It was not shown that the Company was unable to pay its debt in full. The lower Court having rejected the application, the petitioner appealed.

Held, that the application was rightly rejected, for, the petitioner's object, in making the application, was to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the civil Courts.

The principle upon which a Company can be wound up on a creditor's application is simply its inability to pay its just debts. The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks. Such neglect must be judged by reference to the facts of each particular case. Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts.

TULSIDAS LALLUBHI v. THE BHARAT KHAND COTTON MILL COMPANY,
LTD. ... (1914) 39 Bom. 47

—————*Indian Companies Act (VI of 1882), secs. 128 and 131—Winding up—Petition for compulsory winding up of Company by the Court—Grounds to be alleged in petition—Internal mismanagement of the Company not such grounds—Admission of petition, discretion of Courts as to—Shareholder, petition by.*] Any ground alleged under section 128 (c) of the Indian Companies Act in a petition for the winding-up of a Company presented under section 131 of that Act must be of a like nature to the specific grounds given under clauses (a), (b), (c) and (d) of section 128. If any other grounds are alleged they do not fulfil

the requirements of the Act. Allegations as to the internal management or mismanagement of a Company are matters for the shareholders to deal with and do not call for the interference of the Court.

A petition by a shareholder stands in a different footing to a petition by a creditor and should be more closely scrutinized on presentation.

There is no obligation on the Court to admit a petition merely because it is presented. Not only must a petition allege facts which, if proved, would justify an order for winding up a Company, but even if it alleges such facts the Judge has a discretion to consider whether it is really *bona fide*.

The Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the Company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

PIONEER BANK LIMITED, IN THE MATTER OF ... (1914) 39 Bom. 16
COMPANY—*Winding up—List of contributories—Minor—Estoppel by conduct after attaining majority—Indian Companies Act (VI of 1882)—F, a minor, applied for and was allotted certain shares in a limited Company. He received dividends, and continued to do so after attaining majority. On the winding up of the Company he was included in the list of contributories.*

Held, that having intentionally permitted the Company to believe him to be a share-holder and in that belief to pay him dividends since he attained majority, he was estopped by his conduct while a person *sui juris* from denying as between himself and the Company that he was a share-holder.

View of Stirling J. in *Re Yeoland Consols Limited (No. 2)*, (1888) 58 L. T. 922, adopted.

A minor may be a member of a Company under the Indian Companies Act (VI of 1882).

FAZULHOY JAFFER v. THE CREDIT BANK OF INDIA, LIMITED. ... (1914) 39 Bom. 331

COMPENSATION—*Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him.*

See ELECTRICITY ACT (IX OF 1910), SECS. 14, 19 ... 124

COMPROMISE—*Decree—Payment by instalments—Default—Execution—Minority of the legal representative of the judgment-creditor—Step-in-aid of execution—Execution barred by the lapse of twelve years.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 48 ... 256

CONSENT—*Validity of conditional consent by Collector.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 92 ... 530

CONSPIRACY—*Procuring breach of contract—Malice, an essential ingredient.*

See MARRIAGE, CONTRACT OF ... 682

CONSTRUCTION OF DEED—*Simultaneous execution of sale-deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale.] The land in dispute was sold by the defendants to the plaintiffs' father on the 7th November 1892 for Rs. 300. On the same day, the latter agreed with the defendants that if they repaid Rs. 300 in five years, he would re-sell the land to them. From*

1895 the defendants were in possession of the land as tenants of the plaintiffs and paid Rs. 18 as rent every year. In 1910, the plaintiffs sued to recover possession of the land. The defendants claimed to redeem the lands alleging that the transaction of 1892 amounted to mortgage. The first Court held that the transaction was a mortgage and allowed redemption; but the lower appellate Court held that it was a sale and decreed plaintiffs' claim. The defendant having appealed:—

Held, reversing the decree, that in view of the facts and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale, and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale.

MADHAVRAO KESHAVEAO v. SAHEBRAO GANPATRAO ... (1914) 39 Bom. 119

CONSTRUCTION OF LEASE AND SANAD—*Resumption for "public purposes" by Government of land granted by East India Company.*

See RESUMPTION ... 279

STATUTE.

See STATUTE, CONSTRUCTION OF ... 473

Whether effect retrospective.

See MUSSALMAN WAKF VALIDATING ACT (VI OF 1913) SEC. 3 ... 563

WILL OF PARSI—*Devise to two sons in equal shares—Gift over to son of elder son, if he should have one—Failure of male issue to elder one—Provision for adopted son on failure of natural son—Adoption after testator's death and according to Parsi custom three days after death of father—Gift over to grandson on attaining majority—Elder son surviving testator.*

See WILL ... 296

CONTRACT ACT (IX OF 1872), SEC. 23—*Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognized by the Court.*

See HINDU LAW ... 538

SEC. 65—*Covenant in the mortgage-deed—Mortgage and rent-note void—Claim for compensation based on covenant maintainable.*

See BHAGDARI AND NARWADARI TENURES ACT (BOM. ACT V OF 1862), SEC. 3 ... 358

SECS. 134, 137—*Suit against principal and surety—Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908), Order IX, Rule 5, Order XXIII, Rule 1.] A suit was brought in 1913 on a promissory note passed in 1912 by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1: his name was therefore struck out and the suit proceeded against defendant No. 2 alone. The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No. 1's) name struck out, the surety also was thereby discharged. On plaintiff's application under extraordinary jurisdiction,*

Held, reversing the decree and remanding the suit, that the mere omission of his plaintiff to pursue his suit against one of the defendants with the result that that defendant's name was struck off and the suit dismissed against him under Order IX, Rule 5, of the Civil Procedure Code (Act V of 1908) did not discharge the surety, provided the suit was still in time against the principal.

NATHABHAI TRICAMAL v. RANCHODLAL RAMJI ... (1914) 39 Bom. 52

CONTRACT ACT (IX OF 1872), SECS. 151 AND 152— <i>Liability of Railway Companies for loss, damage or destruction of goods entrusted to them for carriage.</i>	
<i>See RAILWAY</i>	... 191
—————SECS. 239, ILLU. (a), 249, 251, 252— <i>Criterion as to transaction being or not being a partnership transaction.</i>	
<i>See PARTNERSHIP</i>	... 261
CONTRACT INCOMPLETE— <i>Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration.</i>	
<i>See HINDU LAW</i>	... 528
CONTRACT OF MARRIAGE— <i>Procuring breach of contract.</i>	
<i>See MARRIAGE, CONTRACT OF</i>	... 682
CONTRACTS BY MEMBERS OF JOINT HINDU FAMILY— <i>Liability of the joint family.</i>	
<i>See HINDU LAW</i>	... 715
CONTRIBUTORIES— <i>Minor—Estoppel by conduct after attaining majority—Winding up of the Company.</i>	
<i>See COMPANY</i>	... 331
CO-PARCENER— <i>Ancestral moveable property.</i>	
<i>See HINDU LAW</i>	... 593
COSTS— <i>Defence of wager.</i>	
<i>See PAKKI ADAT TRANSACTIONS</i>	... 1
————— <i>Taxation—Application by a person for being registered as a shareholder in a Company—Indian Companies Act (VI of 1882), sec. 254—High Court Rules, Rule 704—High Court Manual of Circular, Chapter VIII.] To regulate costs incurred in obtaining an order from the District Court to register the applicant as a shareholder of a Company, recourse must be had to the High Court Manual of Civil Circulars, 1912, Chapter VIII, and not to High Court Rules (Original Side), Rule 704 framed under section 254 of the Indian Companies Act (VI of 1882).</i>	
DAMODAR MOHOLAL GINNING AND MANUFACTURING COMPANY, LIMITED V. NAGINDAS MAGANLAL	... (1915) 39 Bom. 383
COURT FEES ACT (VII OF 1870), SEC. 7, CL. IV (f) AND SEC. II— <i>Suit for accounts and administration—Valuation of the suit for purposes of court-fees.] In a suit for accounts and administration of the estate by the Court, the claim was valued at Rs. 130 for purposes of court fees and at Rs. 30,00,000, for purposes of jurisdiction and pleader's fees. It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate. This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs. 67,968-12-0.</i>	
On appeal to the High Court,	
<i>Held</i> , that having regard to the statements in the plaint an administration suit was maintainable and that it could be treated as a suit for account. The plaintiff would, therefore, be at liberty to value it at Rs. 130 or any other sum under section 7, clause IV (f) of the Court Fees Act.	

In the event of a decree being passed for a larger amount than that covered by the fees already paid, the plaintiff would be precluded by the provisions of section 11 of the said Act from executing such decree until fees liable on the whole amount of the decree had been paid.

KHATTA v. SHEKH ADAM HUSENALLY .. (1915) 39 Bom. 545

COURT-SALE—*Purchaser not a subsequent transferee.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53 ... 507

CREDIT—*Evidence as to.*

See APPELLATE COURT ... 386

CREDITOR, PETITION BY.

See COMPANY ... 47

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 162—*Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872), sec. 157.*] During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed. When examined before the committing Magistrate, she denied the presence of the boy at the scene of the offence. At the trial before the Court of Session, she admitted the presence of the boy. The statement that the witness had made in the investigation was sought to be proved at the trial by the oral deposition of the police officer to whom it was made. The defence objected to this deposition on the ground that it offended against provisions of section 162 of the Criminal Procedure Code. The Sessions Judge overruled the objection and let in the evidence. The accused having appealed,

Held, that the police officer could be allowed to depose to what the witness had stated to him in the investigation, for the purpose of corroborating what she had said at the trial.

EMPEROR v. HANMARADDI ... (1914) 39 Bom. 58

SEC. 195 (1) (c)—*Sanction to prosecute—Mamlatdar's Court—Enquiry into Record of Rights—Mamlatdar's Court is Revenue Court—Land Revenue Code (Bombay Act V of 1879), Chapter XII.*] A Mamlatdar holding an enquiry relating to Record of Rights, under Chapter XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of the section 195 (1) (c) of the Criminal Procedure Code (Act V of 1898).

EMPEROR v. NARAYAN GANPAYA ... (1914) 39 Bom. 310

CUSTODY OF MINOR—*Application by guardian.*

See GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 25 ... 436

CUSTOM OF CASTE—*Custom authorizing either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognized by the Court.*

See HINDU LAW ... 538

MARWARI MERCHANTS—*Fraudulent Hundi.*

See HUNDI SHAH JOG ... 513

DAMAGES—*Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.*

See ELECTRICITY ACT (IX OF 1910), SECS. 14, 19 ... 124

DAMAGES—*Suit for wrongful dismissal of a Municipal Officer.*

See DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SECS. 2, 46
AND 167 ... 600

DEBTS—*Duty of widow to pay her husband's debts even though time-barred—
Widow not bound to pay debts repudiated by her husband in his life-time.*

See HINDU LAW

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DECREE—*Execution—Garnishee order—Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Civil Procedure Code (Act V of 1908), Order XXI, Rule 52—Darkhast kept alive as long as the decree remains unsatisfied—Practice and procedure.* Under a consent decree the sum found due was made payable in instalments; and the plaintiff was to be put in possession of the defendants' lands and also to receive the defendants' share of the revenues of three Inam villages. In the execution proceedings under the decree in 1894, a consent order was taken whereby defendant No. 1 was constituted the plaintiff's tenant of the lands and the revenues of the villages were to be paid to the plaintiff through the Court. The Court then passed an order to the effect that the revenues of the villages should be paid by the village officers into Court. The payments so made were made over to the plaintiff till 1892, when the Court struck off the application for execution on the ground that the Court was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands in 1895 and issued one garnishee order of the same year. The plaintiff having appealed:—

Held, that the order passed upon the darkhast of 1894 continued alive and effective up to 1912, and would remain in force till the plaintiff's debt was satisfied.

PER CURIAM.—Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders issued under Order XXI, Rule 52 of the Civil Procedure Code (Act V of 1908); and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate, yielding a revenue were properly attachable under the same Rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend.

UMABAI v. AMBITRAO ANANT

... (1914) 39 Bom. 80

—*Suit in a Baroda Court—Defendant's objection to jurisdiction and other pleas—defendant's contentions overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.* In a suit brought in a Baroda Court, the defendant objected to the jurisdiction of the Court to try the suit and also raised other pleas. The Court overruled the defendant's contentions and passed a decree against him. The decree having been subsequently transferred to a British Court for execution that Court refused to execute it on the ground of its being a nullity as the defendant had not voluntarily submitted to the jurisdiction of the Baroda Court, he having protested against the right of that Court to entertain the suit at the earliest opportunity.

Held that, having regard to circumstances, the case was one of voluntary submission to the jurisdiction of the Baroda Court as the defendant had raised other pleas along with his objection to the jurisdiction of the Court to entertain the suit and that the decree passed by that Court could be executed by a British Court.

Parry & Co. v. Appasami Pillai (1880) 2 Mad. 407, distinguished.

HARCHAND PANAJI v. GULABCHAND KANJI

... (1914) 39 Bom. 34

DECREE FOR DIVORCE—Permanent maintenance—Award of a lump sum—Payment.

See DIVORCE ACT, INDIAN (IV OF 1869), SEC. 37

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NISI—Decree for possession on payment of a certain sum within six months, in default, forfeiture of the right to recover possession—Appeal—Confirmation of decree—The term of six months to run from the date of the final decree.] The plaintiff brought a suit to recover possession of property as purchaser from defendants Nos. 1—6 and to redeem the mortgage of defendant No. 7. The first Court having dismissed the suit, the appellate Court on plaintiff's appeal passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum within six months from the date of the decree and then to redeem defendant No. 7, and on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections. The High Court confirmed the decree and the plaintiff's second appeal and the defendants' cross objections were dismissed.

Within six months of the date of the High Court's decree the plaintiff deposited in Court the amount payable by him and applied for execution. Defendant No. 7 contended that the plaintiff not having complied with the terms of the decree of the first appellate Court, his right to recover possession in execution was forfeited. The lower Courts upheld the defendant's contention and dismissed the *darkhast*.

On second appeal by the plaintiff,

Held, reversing the decree, that the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of the lower Courts, for what was to be looked at and interpreted was the decree of the final appellate Court.

Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh (1900) L. R. 27 I. A. 209 and *Nanchand v. Vitlu* (1891) 19 Bom. 258, followed.

SATWAJI BALAJIRAV v. SAKHARLAL ATMARAMSHET

...(1914) 38 Bom. 175

ON MORTGAGE—Execution—Limitation.

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179

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UPON COMPROMISE—Payment by instalments—Default—Execution—Minority of the legal representatives of the judgment-creditor—Step-in-aid of execution—Execution barred by the lapse of twelve years.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 48

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DEED, CONSTRUCTION OF—Simultaneous execution of sale-deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale.

See CONSTRUCTION OF DEED

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DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SECS. 3 (w), 10 AND 53—Suit falling under sec. 3 (w)—Decision not appealable—Revision by District Judge.] The decision in a suit falling under section 3 (w) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not appealable according to the provisions of section 10 of the Act. Under section 53 of the Act, the District Judge alone and not the Subordinate Judge of the First Class is authorised, in such a case, to pass an order in revision.

SITARAM MORAPPA v. SHRI KHANDOBA

...(1914) 39 Bom. 165

—SECS. 12, 13—

Prior and subsequent mortgages upon the same property by the same mortgagor

to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Subsequent suit barred.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPL. IV,
ORDER II, RULE 2 ... 138

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 13—*Finding on a preliminary issue whether a party is an agriculturist—In what cases is the finding a preliminary decree.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 2, 97 ... 422

SEC. 13—*Mortgage by Vatandar—Suit for account and redemption—Adverse possession by mortgagee—Hereditary Offices Act (Bom. Act. III of 1874), section 5—Mesne profits from the date of suit.* One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867 mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of section 5 of the Vatan Act, the mortgage became void on the death of Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at Rupees four hundred a year. This decree was confirmed by the lower appellate Court.

On appeal to the High Court,

Held, that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee.

Held, further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of section 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit.

Janoji v. Janoji (1882) 7 Bom. 185 applied.

RAMCHANDRA VENKAJI NAIK v. KALLO DEVJI DESHPANDE. (1915) 39 Bom. 587

SECS. 13, 15D AND 16—*Monetary dealings, mortgages and promissory notes—Suit for general account and redemption—One general account of mortgage and promissory note transactions—Mortgages found to be satisfied—Surplus profits under mortgage transactions applied in reduction of the claim on promissory notes—Provision of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for two different classes of suits for account by agriculturists—Sections 15D and 16 of the Act—Mortgage account entirely separate from the promissory note account—Mortgagee not accountable for surplus profits under mortgage transactions.* In a suit for general account under the Dekkhan Agriculturists' Relief Act (XVII of 1879) and for redemption of mortgaged property, the plaintiff combined his claim for account of the mortgage transactions with his claim for an account of moneys lent upon promissory notes. In taking an account the Court made up one general account of the mortgage transactions and the promissory note transactions and having

found that the mortgages were satisfied, applied the profits subsequent to the date of the satisfaction of the mortgage debts in the account in reduction of the amount due to the defendant on the promissory notes.

Held, that the account could not be accepted.

The Dekkhan Agriculturists' Relief Act (XVII of 1879) has made provision for two different classes of suits for account by agriculturists. Section 15D of the Act relates purely and exclusively to mortgage transactions. Under that section the plaintiff-agriculturist may have either a declaration of the amount due or he may combine a declaration of the amount due with a decree for redemption. Section 16 of the Act entitles the plaintiff to sue for a general account of money dealings between him and the lender and for a bare declaration of the amount due without any relief being claimed. Thus the two sections where accounts are contemplated stand on a different footing. Under the Act the mortgage account must be treated as entirely separate from the promissory note account so that the lender mortgagee would not be accountable for surplus profits received by him after the date when the mortgage claims were satisfied.

Janoji v. Janoji (1882) 7 Bom. 185 and *Ramchandra Baba Sathe v. Janardan Apaji* (1889) 14 Bom. 19, referred to.

LAXMANDAS HARAKCHAND v. BABAN

...(1914) 39 Bom. 73

DESHGAT VATAN LANDS—*Grant for Barki service—Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.*

See GRANT

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DISCRETION OF APPELLATE COURT IN THE CONSIDERATION OF EVIDENCE—*Interference with findings of fact of Judge who sees and hears the witnesses, rule as to—Pronouncement of Trial Judge as to credibility of witnesses not to be set aside on a mere calculation of probabilities by Court of Appeal—Relevancy of cross-examination to credit—Trial Judge's opinion on evidence upheld.*

See APPELLATE COURT

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DISCRETION OF COURT—*Admission of petition for winding up of Company.*

See COMPANY

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DISMISSAL OF A MUNICIPAL OFFICER—*Suit for damages for wrongful dismissal.*

See DISTRICT MUNICIPAL ACT (BOMBAY ACT III OF 1901), SECS. 2, 46 AND 167

... 600

DISTRICT DEPUTY COLLECTOR—*Authority to revise.*

See MAMLATDARS' COURTS ACT, BOMBAY (BOM. ACT II OF 1906), SEC. 23

... 552

DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SECS. 2, 46 AND 167—

Dismissal of a Municipal Officer—Suit for damages for wrongful dismissal. When a District Municipality exercising the power given to it by the District Municipal Act (Bom. Act III of 1901) or the statutory rules made under the Act, dismisses an officer of the Municipality, that is an act done or purporting to have been done in pursuance of the Act within the meaning of section 167.

MUNICIPALITY OF RATNAGIRI v. VASUDEO BALKRISHNA

...(1915) 39 Bom. 600

DIVORCE—*Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognized by the Court.*

See HINDU LAW

... 538

DIVORCE ACT, INDIAN (IV OF 1869), SECS. 4, 6, 7, 8 AND 15—*Decree for dissolution of marriage—Assistant Judge—Jurisdiction.*

See BOMBAY CIVIL COURTS ACT (XIV OF 1869), SEC. 16

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—**SEC. 37**—*Decree for divorce—Permanent maintenance—Award of a lump sum—Payment.*] In a suit for divorce brought by the wife, the District Judge has, under section 37 of the Indian Divorce Act (IV of 1869), power to make the order for payment of a lump sum for the permanent maintenance of the wife.

Per Hayward J.—The plain meaning of the words of section 37 of the Indian Divorce Act (IV of 1869) is that the gross sum of the money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life.

MISS TAYLOR v. CHARLES BLEACH

... (1914) 39 Bom. 182

DOCUMENTS—*Omission to follow provisions of section 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses.*

See HINDU LAW

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EJECTMENT, SUIT FOR—*Sub-lease by a Fazendar.*

See FAZENDARI TENURE

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ELECTRICITY ACT (IX OF 1910), SECS. 14, 19—*Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.*] A gas company laid a 3-inch main in a street in Bombay. Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company's cables, by reason of the position of the cables. It was found that the work of laying the cables had not been executed, nor must it be deemed to have been executed, to the reasonable satisfaction of the gas company.

Subsequently the gas company desired to replace their 3-inch main with a 4-inch main and for this purpose opened up the street in question, when they discovered the position of the cables. On account of the position of these cables the gas company were compelled to make a diversion on the route taken by their 4-inch main and claimed that the electric supply company should pay the cost thereof; the latter company refused to do so.

Held, that the damages, if any, suffered by the gas company were damages recoverable under section 19 of the Indian Electricity Act of 1910 as the damage alleged lay in the gas company being deprived of access to its own property (the main) which was inflicted once and for all when the electric supply company laid their cables over the main, and that it was a question of fact whether such damage had been committed.

Held further, that the gas company were not compelled to proceed under section 14 of the Act and did not lose their remedies against the electric supply company by reason of their not having availed themselves of the provisions of that section.

Quere, whether a licensee causing only as little damage, detriment and inconvenience as may be is liable for damages under section 19 of the Indian Electricity Act (IX of 1910)

IN THE MATTER OF BOMBAY GAS COMPANY, LTD. AND BOMBAY ELECTRIC
SUPPLY AND TRAMWAYS COMPANY, LTD. ... (1914) 39 Bom. 124

EQUITY OF REDEMPTION—*Extinguishment—Mortgagor passing a rajinama to mortgagee for the land—Mortgagee executing kabulayat to pay Government assessment.*] In 1876, the plaintiff mortgaged the land in dispute, to the defendants; and in 1879 passed a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a complementary *kabulayat* agreeing to pay Government assessment on the land. The plaintiff having sued to redeem the mortgage,

Held, dismissing the suit, that the *rajinama* and *kabulayat* effectually extinguished the plaintiff's equity of redemption.

VENKAJI NARAYAN v. GOPAL RAMCHANDRA ... (1914) 39 Bom. 55

ESTOPPEL—*Certified extracts of Rent Roll of "quit and ground rent" land—Office of Collector of Bombay—Statements therein as to nature of tenure of land—Suit by mortgagee relying on such extracts and advancing money on title there disclosed against Secretary of State—Act only for administration and collection of revenue—No estoppel created in matters of title.*

See BOMBAY CITY LAND REVENUE ACT (BOM. ACT II OF 1876),
SECS. 30, 35, 39, 40 ... 664

ESTOPPEL BY CONDUCT AFTER ATTAINING MAJORITY—*Liability of the minor.*

See COMPANY ... 331

EVIDENCE ACT (I OF 1872), SEC. 52—*Specific allegations of coercion made in the plaint—Allegations disbelieved—Different kind of coercion held probable on other circumstances and doubts—Finding not secundum allegata et probata.*

See SPECIFIC RELIEF ACT (I OF 1877), SEC. 39 ... 149

SECS. 54, 165—*Relevancy of previous conviction for the purpose of determining extent of sentence.*

See PRACTICE ... 326

SEC. 92, AND PROV. (2)—*Suit on promissory note—Plea of an oral agreement purporting to vary note—Admission in pleadings—Admission subject to condition—Absence of substantive proof of oral agreement—Onus of proof.*] Although there are cases where it is allowable to urge an oral agreement which would have the effect of leaving matters otherwise than if they had depended on the written agreement alone, the oral agreement must be clearly proved, and the onus of doing so is on him who sets it up.

In a suit on a promissory note dated 23rd December 1907, executed by the defendant (appellant) and a firm of H. C. and payable on demand, the defendant pleaded that by an oral agreement between the parties his liability on the note was to cease on 20th January 1908, a simple acknowledgment by H. C. being then substituted for the note. The plaintiff stated in his plaint that the defendant's liability was only to come to an end at the date named provided he had then received full security for advances he had made to H. C., which were only partially secured. The parties went to trial and were allowed to give evidence, on which the Trial Judge in the High Court taking it as admitted that the defendant's

liability ceased on 30th January 1908, and not accepting as proved the allegation of the plaintiff as to further security, decided in favour of the defendant, and dismissed the suit. The Appellate Court reversed that decision holding that evidence of the oral agreement was inadmissible under section 92 of the Evidence Act (I of 1872).

Held by the Judicial Committee that a mere amendment of the pleadings would have brought the defendant's contention within proviso (2) of section 92, as being an oral agreement as to which the promissory note "was silent, and which was not inconsistent with its terms." In that view their Lordships were of opinion that it would not be satisfactory to decide against the defendant without considering the evidence, and they held that the failure of the plaintiff to prove his version of the transaction did not necessarily (as held by the Trial Judge) imply that the defendant's case was thereupon established. The agreement alleged by the defendant must be substantively proved, and that had not been done. It was permissible for a tribunal to accept part, and reject the rest of a witness' testimony; but an admission in pleading cannot be so treated, and if it be made subject to a condition it must either be accepted with the condition attached, or not accepted at all. An admission, therefore, that the note was to be held as satisfied on 30th January 1903 by a new debt on the part of H. C., provided that full security was found for the whole debt by that date, could not be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

MOTABHOY MULLA ESSABHOY v. MULJI HARIDAS ... (1914) 39 Bom. 399

EVIDENCE ACT (I OF 1872), SEC. 145—*Omission to follow provisions as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses.*

See HINDU LAW ... 441

SEC. 157—*Proof of the statement by oral deposition of the police officer to whom it is made.*

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 162 ... 58

EXECUTION—*Baroda Court decree.*

See DECREE ... 34

Decree on mortgage—Limitation.

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 ... 20

Decree upon a compromise—Payment by instalments—Default—Minority of the legal representatives of the judgment-creditor—Step-in-aid of execution—Execution barred by the lapse of twelve years.

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 48 ... 256

Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Dakkhast kept alive as long as the decree remains unsatisfied.

See DECREE ... 80

FAZENDARI TENURE—*Sub-lease by a Fazendar.*] The plaintiff, claiming under the original Fazendar, sublet certain land to the defendant's predecessor. The agreement, after reciting (*inter alia*) that the sub-tenant took the land on Fazendari tenure, continued:—

"I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession, and if the land be required, you are to pay me the valuation of the said house whatever the same may come to."

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<i>Held</i> , on the facts, that, on the true construction of the lease, the plaintiff was not entitled to eject the defendants.	
The meaning of the word 'Fazendari,' when it occurs in a written document embodying the contract between the parties, considered, and the remarks of Farran J. in <i>Purmanandas Jivandas v. Ardeshir Framji</i> (1886) 39 Bom. 320, note, approved.	
YESHWANT VISHNU v. KESHAVRAO BHAJI	...(1914) 39 Bom. 316
FINDING OF FACT— <i>Ground for setting aside.</i>	
See SPECIFIC RELIEF ACT (I OF 1877), SEC. 39	... 149
Rule as to interference with finding of fact of Judge who sees and hears the witnesses.	
See APPELLATE COURT	... 386
FOREIGN COURT DECREE— <i>Execution by British Courts.</i>	
See DECREE	... 34
FORFEITURE— <i>Lease.</i>	
See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXII, RULE 10...	568
FRAUD— <i>General allegation without specific issue or plea.</i>	
See HINDU LAW	... 441
FRAUDULENT TRANSFER— <i>Transfer voidable at the option of the person defrauded.</i>	
See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53	... 507
GARNISHEE ORDER— <i>Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Darkhast kept alive as long as the decree remains unsatisfied.</i>	
See DECREE	... 80
GENERAL CLAUSES ACT, BOMBAY (BOM. ACT I OF 1901), SEC. 3— <i>The term "Collector" does not include "District Deputy Collector."</i>	
See MAMLATDARS COURTS ACT, BOMBAY (BOM. ACT II OF 1906)	... 552
GOVERNMENT— <i>Ultra vires order—Limitation.</i>	
See LIMITATION ACT (IX OF 1908), SCH. 1, ART. 14	... 494
GOVERNMENT OFFICIALS IN BOMBAY— <i>Scheme to erect dwelling houses at adequate rent for the accommodation of.</i>	
See RESUMPTION	... 276
GRANT— <i>Grant for Barki service—Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.]</i> In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right.	
YELLAVA SAKREFFA v. BHIMAPPA GIREFFA	...(1914) 39 Bom. 68

GUARDIAN—*Application by.*

See GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 25

... 438

GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 25—*Custody of minor—Application by guardian—Guardian need not be a certificated guardian.*] An application under section 25 of the Guardians and Wards Act (VIII of 1890) for the custody of a minor can be made by a guardian, who need not be a certificated guardian.

DAYABHAI RAGHUNATHDAS v. BAI PARVATI

...(1915) 39 Bom. 438

GUJARAT TALUQDARS' ACT (BOM. ACT VI OF 1888)—*Rights of lessees from Bombay Government.*

See KASBATIS

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HEREDITARY OFFICES ACT (BOM. ACT III OF 1874), SEC. 5.—*Mortgage by Vatanadar—Suit for account and redemption—Adverse possession by mortgagee—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 13—Mesne profits from the date of suit.*] One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867, mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of section 5 of the Vatan Act, the mortgage became void on the death of Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at rupees four hundred a year. This decree was confirmed by the lower appellate Court.

On appeal to the High Court,

Held, that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee.

Held, further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of section 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit.

Janoji v. Janoji (1882) 7 Bom. 185, applied.

RAMCHANDRA VENKAJI NAIK v. KALLO DEVJI DESHPANDE

...(1915) 39 Bom. 587

HIGH COURT—*Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.*

See HIGH COURTS ACT (24 & 25 VICT. C. 104), SECS. 2, 9 AND 13

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HIGH COURT MANUAL OF CIVIL CIRCULARS, CHAPTER VIII—*Application by a person for being registered as a shareholder in a Company—Taxation.*

See COSTS

... 383

HIGH COURT RULES, APPELLATE SIDE, RULES 1 AND 5—*Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.*

See HIGH COURTS ACT (24 & 25, VICT. C. 104), SECS. 2, 9 AND 13 ... 604

ORIGINAL SIDE, RULE 62—*Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.*

See HIGH COURTS ACT (24 & 25 VICT. C. 104), SECS. 2, 9 AND 13 ... 604

RULE 704—*Application by a person for being registered as a shareholder in a Company—Taxation.*

See COSTS ... 383

HIGH COURTS ACT (24 & 25 VICT. C. 104), SECS. 2, 9 AND 13—*Amended Letters Patent, clauses 11 and 26—High Court Rules, Original Side, Rule 62—High Court Rules, Appellate Side, Rules 1 and 5—Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.* It is not competent to a single Judge of the Bombay High Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorised so to do by rules.

Per MACLEOD J.—A single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Sub-Judge's Court in the mofussil, and so in effect stay the proceedings.

NARAYAN VITHAL SAMANT v. JANKIBAI

... (1915) 39 Bom.604

HINDU LAW—*Adoption—Effect of invalid adoption—Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration—Incomplete contract.* Under Hindu Law, a boy whose adoption has been found to be invalid has no right to be maintained out of the estate of the adopted family.

The plaintiff, claiming to be the adopted son of the late Thakor of Mehelol, applied to obtain certain lands from the estate by way of maintenance, to the Collector who was in charge of the estate. The Collector persuaded the present Thakor (defendant) to settle the matter. Accordingly, the defendant made a declaration in writing that he would give the Kankanpur *wanta* by way of maintenance to the plaintiff and his direct lineal heirs. The defendant did not execute any formal deed to convey the lands. The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration:—

Held, that the defendant was not bound by the declaration, which marked only a stage in the negotiations, which, unless completed, could be broken off at any time by either side.

DALPATSINGJI v. RAISINGJI

... (1915) 39 Bom.528

Adoption—Half-brother—Mitakshara. The adoption of a half-brother is not invalid under Hindu law.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN

.. (1915) 39 Bom.410

Adoption—Validity of adoption—Non-performance of ceremony of datta homam—Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of section 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents

so used, and basing decision on them to prejudice of witnesses—General allegations of undue influence and fraud without specific issues or pleas.] On this appeal, their Lordships of the Judicial Committee, in a suit to establish the validity of an adoption, *Held*, (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the adoption was valid.

Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay.

Valubai v. Govind Kashinath (1899) 24 Bom. 218 approved, as being based not on the particular degree of relationship, but upon the broad ground of the identity of *gotra*.

A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice; and one of the trustees declined to act, *Held* that the consent of the declining trustee was not necessary, and the adoption made with the consent of the other four trustees was valid.

It is a general, salutary, and intelligible rule, and one substantially embodied in section 145 of the Evidence Act (I of 1872) that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and clear up the particular point of ambiguity or dispute: and the duty of enforcing such a rule is clear, especially where a witness' reputation or character is at stake. In this case, where the general principle of this rule and the specific provisions of section 145 had not been followed, but documents had been used for the purpose of contradicting witnesses without calling their attention to the portions of the documents so used, their Lordships were of opinion that the decision of the High Court on the evidence amounted to an inferential verdict of perjury against the witnesses which was not justified.

Semble: Where coercion, undue influence, fraud and misrepresentation are set up as rendering a transaction invalid, each one should be specifically pleaded, and a definite issue upon it settled. In attacking an adoption an issue, "whether the plaintiff is a validly adopted son," is not one on which any of the above grounds should be permitted to be raised by general allegations.

Wallingford v. Mutual Society (1880) 5 App. Cas. 685 per Lord Selborne; and *Gunga Narain Gupta v. Tiluckram Chowdhry* (1888) 15 Cal. 553: L. R. 15 I. A. 119 referred to as to the defence of fraud.

BAL GANGADHAR TILAK v. SHRINIVAS PANDIT

...(1915) 39 Bom. 411

HINDU LAW—Ancestral moveable property—Will—Bequest—Bequest by Coparcener.] One Pandharinath Ramchandra, a Hindu testator made a will by which he directed that Rs. 2,001 should be paid to each of his three daughters out of the ancestral moveable property. He died leaving a son surviving him. In a suit by one of the daughters to recover the amount of the legacy from the estate of the testator,

Held, that the legacies were directed to be paid by the testator out of property which he had no power to dispose of by will.

Vitla Batten v. Yamenamma (1874) 8 Mad. H. C. R. 6, followed. *Hanmant-apa v. Jivubai* (1900) 24 Bom. 547, distinguished and *Bachoo v. Mankorebai* (1904) 29 Bom. 51 and (1907) 31 Bom. 373, distinguished.

PARVATIBAI v. BHAGWANT VISHWANATH PATHAK

...(1915) 39 Bom. 593

—Ancestral property—Will—Probate—Payment of full probate duty.

See JOINT HINDU FAMILY

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HINDU LAW—Debts—Widow—Duty of widow to pay her husband's debts even though time-barred—Widow not bound to pay debts repudiated by her husband in his life time.] Under Hindu Law, a widow is under a pious obligation to pay her deceased husband's debts, even though they may be time-barred; but she is not bound to pay debts which her deceased husband had repudiated before his death.

BHAGWAT BHASKAR v. NIVRATTI SAKHARAM

... (1914) 39 Bom. 113

—Dissolution of marriage—Custom of caste—Custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognised by the Court—Indian Contract Act (IX of 1872), section 23.] A custom, stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court. It must be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act (IX of 1872) and is equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession.

Reg. v. Karsan Goja and *Reg. v. Bai Rupa* (1864) 2 Bom. H. C. R. 124, followed.

KESHAV HARGOVAN v. Bai GANDI

... (1915) 39 Bom. 538

—Joint Hindu family and joint family business—Contracts by certain members of the family for the benefit of the family—Managing members—Liability of the joint family for contracts entered into by managing members.] A joint Hindu family firm must be regarded like any other joint family asset if it in fact belongs to the joint family.

If a business be carried on by the members of a joint Hindu family for the benefit of the entire family and there are members of the family who do not actively participate in the conduct of the business, particularly if such business has been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts and the liability of those members of the family not actively engaged in the conduct of the business would probably be restricted to the share of each such member in the joint Hindu family property.

In a case where 'one or more members of a joint Hindu family start a business of their own not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other members, the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition.

JOHARMAL LADHOORAM v. CHETRAM HARISING

... (1915) 39 Bom. 715

—Mitakshara—Partition by grandsons—Paternal step-grandmother entitled to a share.] According to the Mitakshara, the paternal step-grandmother is entitled to a share in the family estate when it is partitioned among her grandsons.

VITHAL RAMKRISHNA v. PRAHLAD RAMKRISHNA

(1915) 39 Bom. 373

—Mitakshara, Ch. II, sec. 5, pl. 4 and 5—Mayukha, Ch. VIII, pl. 18—Compact series of heirs—Brother's widow—Sapinda—Uncle's sons—

Brother's widow nearer heir.] The widow of a brother of the deceased is, as a *sapinda*, a nearer heir of the deceased than his paternal uncle's sons.

BASANGAVDA v. BASANGAVDA

...(1914) 39 Bom.87

HINDU LAW—*Mitakshara*, chap. II, sec. 8, para. 2—*Claim by plaintiff as Pitrai Chela to recover the property of a deceased Bairagi—Claim not maintainable on the ground of custom and Hindu Law—Bairagis—Sanyasis—Hermit, ascetic, student in theology—Heirs—Preceptor, virtuous pupil and spiritual brother in reverse order.*] The plaintiff claiming as Pitrai Chela of a deceased Bairagi sued to recover the property of the deceased.

Held, dismissing the suit, that both on the ground of custom and on the ground of Hindu Law the plaintiff had failed to make out his case.

The declared heir of a Sanyasi under the *Mitakshara* is a virtuous pupil.

According to the *Mitakshara*, chap. II, section 8, para. 2, the heirs of the property of a hermit, of an ascetic and of a student in theology are the preceptor, the virtuous pupil and the spiritual brother belonging to the same hermitage in the inverse order.

Quere, whether Bairagis can be classed as Sanyasis because the order of Bairagis is not confined to the members of the twice born castes.

RAMDAS GOPALDAS v. BALDEVDAJJI KAUSHALYADAJJI

... (1914) 39 Bom.168

Partition—Property to be partitioned should be taken as existing at the date of the suit—Shares taken away by some of the co-parceners before the suit not to be taken into account.] The plaintiff, as representing one branch of the family, sued the defendants who represented the other two branches, to recover by partition his share in the property which he alleged was one-third. The plaintiff had two brothers, one of whom had separated from the family by receiving his share (which then was 1/12th) some years before the suit. The defendants contended that the 1/12th share should go in reduction of the plaintiff's share at the partition, that is, he was entitled to 1/3 minus 1/12 = 1/4th share. The lower Court having awarded a 1/3rd share to the plaintiff, some of the defendants appealed:—

Held, the share to which the plaintiff was entitled in the family property was 1/3rd and not 1/4th, for partition should be made *rebus sic stantibus* as on the date of the suit.

PRANJIVANDAS SHIVLAL v. ICHHARAM

... (1915) 39 Bom.734

HUNDI SHAH JOG—*Payment to the Shah—Fraudulent Hundi—Duty of Shah to trace the drawer—Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants—In case of fraud, notice, when to be given—Losses.*] On the 10th June 1912 the defendants presented to the plaintiff for payment a hundi for Rs. 3,000 purporting to be drawn by one R in favour of M on the plaintiff payable at sight to a *Shah*. The plaintiff having had no advice regarding the said hundi refused to pay the said sum of Rs. 3,000. On the next day the plaintiff received a letter purporting to be written by R from Harpalpur, enclosing a railway receipt for 300 bags of linseed, stated to have been consigned by R from Ranipur Station, and asking the plaintiff to sell the goods and in the meantime to accept and pay on presentment two hundis, each for Rs. 3,000, drawn by R in favour of M on the plaintiff, payable at sight to a *Shah*. The same day the plaintiff handed over the said railway receipt to one K and received payment of Rs. 5,600. The plaintiff thereupon paid Rs. 3,000 together with one day's interest to the defendants in respect of the hundi which had been presented by the defendants to the plaintiff on the previous day as aforesaid and which was one of the hundis mentioned in the letter. The

goods referred to in the railway receipt never arrived and K returned the said receipt to the plaintiff and was repaid the sum of Rs. 5,600. On inquiries being instituted it was found that no such person as R existed and that the hundi and the railway receipt were forged. The plaintiff sued to recover the money from the defendants relying on the custom prevailing among Marwari Merchants that the Shah who obtained payment of a Shah Jog hundi was, in the event of the hundi turning out to be a false, fraudulent, stolen, or forged hundi, bound to refund the amount of the hundi with interest unless he "traced it to its source," i. e., produced the actual drawer or the person who committed the fraud.

Held, (1) that the defendants had been paid not as Shah but as indorsee for collection of a hundi purporting to be drawn against the security of a railway receipt.

(2) Assuming that there might be a liability imposed on the defendants by reason of the payment, to refund or to trace the hundi to its source, this would only be the case provided notice was given within reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund.

(3) That the hundi had been "traced to its source" within the meaning of the Marwari Association Rules before the defendants received information of the fraud.

R. D. SETHNA v. J WALAPRASAD GAYAPRASAD ... (1914) 39 Bom.513

HURT—*Performance of eye-operation with ordinary scissors—Neglect of ordinary precautions—partial loss of eye-sight.*

See PENAL CODE (ACT XLV OF 1860), SECS. 337, 338 ... 523

IMMORAL—*Custom of caste.*

See HINDU LAW ... 538

INAMDAR—*Suit by an Inamdar against a Khatedar for recovery of sums—Dues—Suit not cognizable by a Small Cause Court—Set-off claimed in a capacity different from that in suit, not allowable.*

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 13 ... 131

INSOLVENCY—*Mortgagor's petition for declaration of insolvency—Opposition by mortgagee judgment-creditor—Step-in-aid of execution—Limitation.*

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 ... 20

—*Survival of the cause of action.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXII, RULE 10 ... 568

INSTALMENTS—*Default in payment.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 48 ... 256

JOINT FAMILY BUSINESS—*Liability of the joint family for contracts entered into by managing members.*

See HINDU LAW ... 715

JOINT HINDU FAMILY—*Ancestral property—Will—Probate—Payment of full probate duty.*] In a case where there was admittedly a joint Hindu family consisting of a father and a minor son, the father made a will in effect bequeathing the whole property to his minor son. It was not disputed that the property covered by the will was joint family property. The executors contended that the deceased

testator had no beneficial interest in any part of the property devised, and therefore they were exempted from the payment of any probate duty:—

Held, that where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will.

Collector of Kaira v. Chunilal (1904) 29 Bom. 161, distinguished.

KASHINATH PARSHARAM *v.* GOURAVABAI

... (1914) 39 Bom. 245

JOINT HINDU FAMILY—*Contracts by certain members of the family for the benefit of the family—Managing members—Liability of the joint family for contracts entered into by managing members.*

See HINDU LAW

... 715

JOINT VENTURE, AGREEMENT FOR—*Liability of co-adventurers against whom there is no document of debt binding on its face.*

See PARTNERSHIP

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JUDGE—*Single Judge sitting on the original side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.*

See HIGH COURTS ACT (24 & 25 VICT. CH. 104) SECS. 2, 9 AND 13

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JURISDICTION—*Powers of Assistant Judge to decide a suit under the Indian Divorce Act (IV of 1869).*

See BOMBAY CIVIL COURTS ACT (XIV OF 1869), SEC. 16

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—————*Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.*

See HIGH COURTS ACT (24 & 25 VICT. C. 104), SECS. 2, 9 AND 13

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—————*Suit in a Baroda Court—Defendant's objection to jurisdiction and other pleas—Defendant's contention overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.*

See DECREE

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KASBATIS—*History and status of Kasbatis in Gujrat—Ahmedabad Taluqdars' Act (Bombay Act VI of 1862)—Gujarat Taluqdars' Act (Bombay Act VI of 1888)—Bombay Land Revenue Code (Bombay Act V of 1879), secs. 68, 73—Rights of Kasbatis after cession to and annexation by British Government—Rights of Lessees from Bombay Government—Onus of proof on claimant of rights of permanent tenure—Lease implies no obligation to renew at end of term—Obligation to give up possession at end of lease.] In this case their Lordships of the Judicial Committee held (reversing the judgments of the Courts below) that the respondent, the descendant of a family of Kasbatis who were in possession of a village called Charodi in the District of Ahmedabad in Gujrat at the date of the cession of that district by the Peishwa to the British Government, and whose predecessors-in-title held thereafter under leases from the Government, were mere lessees of the Government of Bombay, bound to give up, at the end of each term of lease, possession of the village, and were never legally entitled as each lease terminated to have a new lease granted to the last lessee or representative, and therefore never acquired permanent possession of the village.*

The only legal enforceable right the Kasbatis could have as against the British Government were those, and those only which that Government by agreement, express or implied, or by legislation chose to confer upon them. The relation in

which they stood to their native sovereign, and the consideration of the existence, nature, and extent of their rights before the cession were only relevant matters for the purpose of determining whether and to what extent the British Sovereign had recognised their ante-cession rights, and had elected or agreed to be bound by them. The burden of proving that they had any such rights which the Bombay Government consented to their continuing to enjoy rested upon the respondent.

The principle laid down in *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 7 Moor. L. A. 476 and *Cook v. Sprigg* [1899] A. C. 572, followed.

The just and reasonable inferences to be drawn from the evidence were that the respondent had failed to discharge the onus on her; that the Bombay Government had never by agreement, express or implied, conferred upon her or any of her ancestors the proprietary rights in, or ownership of, the village claimed by her; they never conferred upon any of the lessees of the village a legal right to insist, at the termination of the lease, upon a new lease being granted; they were never under a legal obligation to grant any lease of the village, and the granting or withholding of a lease rested solely in their discretion.

The mere repetition of acts of grace by the Government could not *per se* create a legal right to their continuance.

Prima facie a lease for a term does not import any right to a renewal of it: on the contrary it *prima facie* implies that the lessee's right to the premises ends with the term.

There was no analogy between holdings of the Grassias and the Kasbatis; they and the Mewassies were clearly distinguishable from the Kasbatis. The Ahmedabad Taluqdars Act (Bombay Act VI of 1862) did not apply to Kasbati lessees. They never were Ahmedabad Taluqdars in the true sense; they did not lose their ancient rights of ownership of land by taking leases as did the Grassias and therefore did not suffer the injustice which the statute was designed to remedy.

The effect of sections 68 and 73 of the Bombay Land Revenue Code (Bombay Act V of 1879) read with the Gujarat Taluqdars' Act (Bombay Act VI of 1888) is that a lessee whether a true Taluqdar, or a Thakur, Mewassie, Kasbati, or Naik, is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer.

SECRETARY OF STATE FOR INDIA *v.* BAI RAJBAI

...(1915) 39 Bom. 625

LACHES—*In case of fraud, notice, when to be given.*

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LAND REVENUE ACT, BOMBAY CITY (BOM. ACT II OF 1876), SECS. 30, 35, 39, 40—*Certified extracts of Rent Roll of "quit and ground rent" land.*

See BOMBAY CITY LAND REVENUE ACT (BOM. ACT II OF 1876), SECS. 30, 35, 39, 40.

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LAND REVENUE CODE, BOMBAY (BOM. ACT V OF 1879), SEC. 10—*District Deputy Collector's authority to revise the Mamlatdar's order passed under the Mamlatdars' Courts Act.*

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—SECS. 65, 66—

Possession of land as owner for fifty years—User of land as graveyard and also as timber depot—Order by Government for discontinuing the user as timber depot—Order ultra vires—Limitation Act (IX of 1908), sch. 1, Art. 14. The plaintiffs were in possession of the land in dispute as owners ever since 1860 and used a portion of it as a graveyard, and on another portion of it they built a

shed which was used as a timber shop. In 1871, Government assessed the land and entered it in the Revenue Registers as "Government waste land." The plaintiffs paid no assessment on the land. In 1903, the District Deputy Collector passed an order directing the Mamlatdar to "cause the building and the wood to be removed forthwith from the said land." This order was finally confirmed by the Commissioner on the 24th April 1909. The plaintiffs filed the present suits on the 2nd February 1910, to obtain a declaration that they were absolute owners of the land, to have set aside the order of 1909, and to get a permanent injunction, restraining Government from disturbing the plaintiffs in their possession of the land. The lower Court dismissed the suits holding that the plaintiffs were not absolute owners but occupants only, and that the suits were barred under Article 14 of the first schedule to the Limitation Act, 1908. The plaintiffs having appealed:—

Held, that as the land in dispute was not used for the purpose of agriculture, neither section 65 nor section 66 of the Land Revenue Code (Bom. Act V of 1879) applied to the case, and the orders passed by the Revenue Authorities to evict the plaintiffs were *ultra vires*.

RASULKHAN HAMADKHAN v. SECRETARY OF STATE FOR INDIA... (1915) 39 Bom. 494

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See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXII, RULE 10... 568

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LIMITATION—*Decree for possession on payment of a certain sum within six months in default, forfeiture of the right to recover possession—Appeal—Confirmation of decree—The term of six months to run from the date of the final decree.*

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—*Dismissal of a Municipal Officer—Suit for damages for wrongful dismissal.*

See DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SECS. 2, 46
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LIMITATION—Recovery of deposit.

See **LIMITATION ACT (IX OF 1908), SEC. 10, SCH. I, ARTS. 14, 120** ... 572

LIMITATION ACT (XV OF 1877), SCH. II, ART. 179—Limitation Act (IX of 1908), Schedule I, Article 182—Civil Procedure Code (Act XIV of 1882), sections 351 and 357—Decree on mortgage—Application for execution—Mortgagor's petition for declaration of insolvency—Opposition by mortgagee judgment-creditor—Step-in-aid of execution—Limitation.] An application by mortgagee judgment-creditor in execution of his decree, opposing the insolvency proceeding of the mortgagor judgment-debtor, is a step-in-aid of execution under Article 179, Schedule II of the Limitation Act (XV of 1877), and Article 182, Schedule I of the Limitation Act (IX of 1908).

LAXMIRAM LALLUBHAI v. BALASHANKAR VENIRAM ... (1914) 39 Bom. 20

(IX OF 1908), SEC. 10, SCH. I, ARTS. 14, 120—*Deposit—Order of the Collector refusing payment vested in trust—Specific purpose—No bar of time for recovery.*] In 1835, C, an ancestor of the plaintiffs, had his immoveable property sold to satisfy his debt by the then Maharaja of Satara. Out of the sale-proceeds the debt was paid off and the balance of Rs. 1,793-0-5 was credited in the Government Treasury in the name of C. Subsequently when the Satara Principality ceased in the year 1848 the said amount came to be credited in C's name in the British Treasury. In 1859 C's descendants applied to the British Government for a refund of the amount when it was ordered that the amount be refunded after production of heirship certificate by the applicants and the order was communicated to the then applicants. Subsequently for a number of years there were litigations in Civil Court between C's descendants and the purchasers of C's property as regards the validity of sale. Ultimately in 1906, M. the father of the plaintiffs, made an application to the District Court for a certificate of heirship and an order for the issue of a certificate was passed on the 23rd March 1907. M then made an application on 16th October 1907 to the Collector of Satara requesting for a refund of the amount of Rs. 1,793-0-5 standing credited in C's name. This application was decided against the plaintiffs by the Collector on 6th March 1911. The plaintiffs then appealed to the Commissioner and the appeal was rejected on 17th July 1911. A further appeal to the Government met with a similar fate. Plaintiffs, therefore, on 15th June 1912 filed a suit against the defendant as trustee for the recovery of the amount alleging that the cause of action arose on 17th July 1911 the date when the Commissioner's order was received by the plaintiffs. The defendant contended that the cause of action arose on 6th March 1911 when the Collector rejected the plaintiffs' application and the suit was barred under Articles 14 and 120 of Schedule I of the Limitation Act (IX of 1908).

The lower Court being of opinion that the money was at most held by the defendant on an implied trust held that section 10 of the Limitation Act did not apply to the case and the plaintiffs' claim could only be decreed on the ground that it was within time under Article 120 of the Limitation Act. The defendant having appealed to the High Court,

Held, that the money being vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in the name of C, being specific, section 10 of the Limitation Act did apply.

Held, further, that the plaintiffs were entitled to succeed on the ground not only that their claim did not fall within Article 14 and would be within time if it fell within Article 120 but that it was one to which the bar of limitation could not be pleaded.

SECRETARY OF STATE FOR INDIA v. BAPUJI MAHADEO (1915) 39 Bom. 572

LIMITATION ACT (IX OF 1908)--SEC. 22--Mortgage--Sale of mortgaged property--
Suit against one of the heirs of the mortgagor--Subsequent addition of parties. One K, a Mahomedan, effected a simple mortgage in favour of V on the 23rd of June 1899, the mortgage-debt becoming due on demand which was made on the 1st January 1900. K having died, a suit for sale of the mortgaged property was instituted by V against his minor son as a party in possession of the property on the 23rd of June 1911. The minor's guardian having alleged that K left other heirs, a widow and two daughters, V applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th February 1912. It was contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act 1908. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned. On appeal to the High Court, by the mortgagee,

Held, that the money was specifically charged on the whole mortgaged property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

The suit as originally filed was not instituted to enforce claims against shares in the hands of heirs; it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor and the addition of parties after the expiry of the time did not involve the dismissal of the suit under section 22 of the Limitation Act (IX of 1908).

Guruvayya v. Dattatraya (1903) 28 Bom. 11, followed.

VIRCHAND VAJIKARANSHET v. KONDU

.. (1915) 39 Bom. 729

—**SCH. I, ART. 14--Possession of land as owner for fifty years--User of land as graveyard and also as timber depot--Order by Government for discontinuing the user as timber depot--Order Ultra vires--Land Revenue Code (Bom. Act V of 1879), sections 65, 66.** The plaintiffs were in possession of the land in dispute as owners ever since 1860 and used a portion of it as a graveyard, and on another portion of it they built a shed which was used as a timber shop. In 1871, Government assessed the land and entered it in the Revenue Registers as "Government waste land." The plaintiffs paid no assessment on the land. In 1908, the District Deputy Collector passed an order directing the Mamlatdar to "cause the building and the wood to be removed forthwith from the said land." This order was finally confirmed by the Commissioner on the 24th April 1909. The plaintiffs filed the present suits on the 2nd February 1910, to obtain a declaration that they were absolute owners of the land, to have set aside the order of 1909, and to get a permanent injunction restraining Government from disturbing the plaintiffs in their possession of the land. The lower Court dismissed the suits holding that the plaintiffs were not absolute owners but occupants only, and that the suits were barred under Article 14 of the first schedule to the Limitation Act, 1908. The plaintiffs having appealed:—

Held, that as the land in dispute was not used for the purpose of agriculture, neither section 65 nor section 66 of the Land Revenue Code (Bom. Act V of 1879) applied to the case, and the orders passed by the Revenue Authorities to evict the plaintiffs were *ultra vires*.

Held, further, that the suits were not barred by Article 14 of the Limitation Act (IX of 1908), inasmuch as it was not necessary for the plaintiffs to have the order set aside.

RASULKHAN HAMADKHAN v. SECRETARY OF STATE FOR INDIA (1915)

39 Bom. 484

LIMITATION ACT (IX OF 1908)—SCH. I, ART. 62—*Mortgagor holding as tenant of mortgagee for upwards of twelve years—Adverse possession of limited interest—Mortgage and rent-note void.*

See BHAGDARI AND NARWADARI TENURES ACT (BOM. ACT V OF 1862), SEC. 3 ... 358

ARTS. 142, 144—*Suit for possession—De facto possession with defendant—Burden of proof.* Where the plaintiff alleges possession of land, and it is found that part of the land is *de facto* in possession of the defendant, the case falls under Article 142, and not Article 144, of Schedule I to the Indian Limitation Act (IX of 1908). Every suit for possession of immovable property in which the plaintiff alleges that he has had possession must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within twelve years of the date of the suit.

SUBAPPA v. VENKAPP

... (1914) 39 Bom. 335

ART. 182—*Decree on mortgage—Application for execution—Mortgagor's petition for declaration of insolvency—Opposition by mortgagee judgment-creditor—Step-in-aid of execution—Limitation.*

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 ... 20

ART 182—*Decree upon a compromise—Payment by instalments—Default—Execution—Minority of the legal representative of the judgment-creditor—Step-in-aid of execution—Execution barred by the lapse of twelve years.*

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—*Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration.*

See HINDU LAW ... 528

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See MARRIAGE, CONTRACT OF ... 682

MAMLATDAR—Enquiry into Record of Rights—Mamlatdar's Court is Revenue Court.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195 (1) (c). 310

MAMLATDARS' COURTS' ACT, BOMBAY (BOM. ACT II OF 1906), SEC. 23—Possessory Suit—District Deputy Collector's authority to revise—Bombay General Chausas Act (Bombay Act I of 1904), section 3—The term "Collector" does not include "District Deputy Collector"—Land Revenue Code (Bombay

Act V of 1879, section 10.] The term "Collector" in section 23 of the Mamlatdars' Courts Act (Bom. Act II of 1906) does not include "District Deputy Collector" in view of the express definition of the term in section 3 of the Bombay General Clauses Act (Bom. Act I of 1904). A District Deputy Collector has, therefore, no authority to pass any order under the Mamlatdars' Courts Act (Bom. Act II of 1906).

Keshav v. Jairam (1911) 36 Bom. 123, dissented from.

SONU JANARDAN v. ARJUN WALAD BARKU

...(1915) 39 Bom. 552

MANAGER—*Liability of the joint family for contracts entered into by managing members.*

See HINDU LAW

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MARRIAGE, CONTRACT OF—*Procuring breach of contract—Conspiracy—Cause of action—Malice, an essential ingredient—Tort.* The first plaintiff betrothed his son, the second plaintiff, to one J. Subsequently J.'s father married her to the first defendant. Thereupon the plaintiffs brought this action against the first defendant and his sisters, the second and third defendants, to recover damages, alleging that they (the defendants) had plotted and conspired together wrongfully to procure the breach of the first contract of marriage.

The conspiracy alleged was not proved at the trial nor was it proved that the first defendant knew at the time of his marriage with J. of her previous betrothal to the second plaintiff.

Held: (1) that the suit was not maintainable;

(2) that no legal right inhering in the plaintiff had been violated, since according to Hindu law, by which the parties were governed, a father was entitled to break off his daughter's engagement should a more suitable bridegroom be available.

In an action of conspiracy to procure a breach of contract malice is an essential ingredient of the cause of action.

Rule in *Lumley v. Gye* (1853) 22 L. J. Q. B. 463, considered and its universal applicability doubted.

KHIMJI VASSONJI v. NARSI DHANJI

...(1914) 39 Bom. 682

DISSOLUTION OF—*Assistant Judge—Jurisdiction to pass a decree for dissolution of marriage.*

See BOMBAY CIVIL COURTS ACT (XIV OF 1869), SEC. 16

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MATADARS' ACT (BOM. ACT VI OF 1887), SECS. 9 AND 10—*"Heir next in succession"—Succession to Matadari property—Succession not confined to the limits of Matadar family—Heir to be ascertained by reference to the personal law governing the parties.* One R, the representative Matadar, who inherited his Mata from his mother's side, having died, disputes arose as to the succession to the Matadari property between B, who was the daughter of a maternal cousin of R, and D who was the grand-nephew of R.

Held, that D was the preferential heir to B, as in order to ascertain the heir of a deceased Matadar, the Court was not confined to the limits of the Matadar family and should have in the first instance reference to the personal law which governed parties.

DAYA KHUSAL v. BAI BHIKHI

...(1915) 39 Bom. 478

MAYUKHA, CH. VIII, PL. 18—*Compact series of heirs—Brother's widow—Uncle's sons—Brother's widow nearer heir as sapinda.*

See HINDU LAW

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MERCHANT SEAMEN ACT (I OF 1859), SEC. 83, CL. 4—*Merchant Shipping Act (57 & 58 Vic. c. 60) sections 114, clause 3 and 225, clauses (b) and (c)—Wilful disobedience of lawful commands—Order given to transfer from one ship to another—Seaman disobeying the order—Clause about transfer in articles of agreement not ultra vires.* The accused signed articles of agreement in London with the Master of the SS. Arcadia (a steamer belonging to the Peninsular and Oriental Steam Navigation Company), under which he agreed *inter alia* to obey the lawful commands of the Master or the superior Officers, and to transfer to any other vessel of the Company, when required during the period of service. These articles were initialled by an Officer of the Board of Trade. When the SS. Arcadia arrived in the Bombay Harbour it was sold by the Company to an Indian Merchant. The accused was then ordered by the Marine Superintendent of the Company in the presence of the Chief Officer of the SS. Arcadia to transfer himself to the SS. Salsette, another boat belonging to the Company. For a wilful disobedience of this order the accused was convicted under section 83, clause 4 of the Merchant Seamen Act (I of 1859). The accused applied to the High Court against the conviction, contending, first, that the article respecting transfer was *ultra vires*, and secondly, that the order as to transfer given by the Marine Superintendent of the Company was not a lawful command:—

Held, that having regard to section 114, clause 3 of the Merchant Shipping Act (57 and 58 Vic. C. 60) and to the fact that the articles of agreement had been initialled by an Officer of the Board of Trade, the article as to transfer was not *ultra vires*.

Held, further, the order to transfer having been given by the Marine Superintendent of the Company in the presence of the Chief Officer of the SS. Arcadia was a lawful command of the latter, failure to obey which was punishable under section 83, clause 4 of the Merchant Seamen Act (I of 1859).

EMPEROR v. A. GOODHEW

...(1915) 39 Bom. 558

MERCHANT SHIPPING ACT (57 AND 58 VICT. C. 60), SECS. 114, CL. 3, AND 225, CLS. (B) AND (C)—*Order given to transfer from one ship to another—Seaman disobeying the order—Clause about transfer in articles of agreement not ultra vires.*

See MERCHANT SEAMEN ACT (I OF 1859), SEC. 83, CL. 4

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<i>Held, dismissing the suit, that the rajinama and kabulayat effectually extinguished the plaintiff's equity of redemption.</i>	
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Qua the client the *pakka adatia* is a principal and not a disinterested middleman bringing two principals together. The question which has to be decided is what on the evidence was the common intention of the parties with regard to the settlement or completion of the transactions in dispute.

A defendant who has successfully pleaded a lawful defence is entitled to his costs.

Burjorji Ruttonji v. Bhagwandas Parashram (1913) 38 Bom. 204, followed.

CHHOGMAL BALKISSONDAS v. JAINARAYAN KANAIALAL ... (1913) 39 Bom. 1

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PARTNERSHIP—*Agreement for joint venture in business—Contract Act (IX of 1872), secs. 239, illustration (a), 249, 251, 252—Liability of co-adventurers against whom there is no document of debt binding on its face—Operations of buying and selling natural to a partnership, and for the partnership—Liability of both defendants on hundis drawn separately by each for payment of his own share of goods—Criterion as to transaction being or not being a partnership transaction.* The respondents carrying on business in Mauritius and having separate offices in Bombay made an agreement for one year "for the purpose of doing business in partnership" in brown sugar to be shipped from Mauritius to Hongkong, and there disposed of on commission sale by the appellant, a Bombay merchant with an agency at Hongkong, the profits of the joint venture to be shared by the respondents equally. The shipments were to be made jointly in Mauritius, a half share by each of the respondents, each one drawing hundis against his own half

share, and separate account sales of their respective shares to be rendered to them by the appellant who undertook to arrange for the necessary credit if the Banks in Mauritius would not discount the hundis drawn by the respondents; and an endorsement to that effect was made on the agreement and signed by the appellant. The terms of the agreement were carried out and shipments of sugar were made, but in respect of the hundis drawn by each respondent against his half share recourse was not had first to the Banks in Mauritius, but the hundis were at once drawn on and accepted by the appellant at Bombay. The shipments resulted in a loss. The first respondent had, when the hundis drawn by him became due, retired them but the second respondent, who had become insolvent, had not retired the hundis of which he was the drawer with the result that the appellant whose name was on the hundis as acceptor had to retire them. In a suit by the appellant against the respondents, and the Official Assignee for the money advanced to pay the hundis, the first respondent alone defended it, his defence being that he had paid all the hundis drawn by him, and was not liable for those drawn by the second respondent.

Held (reversing the decision of the Court of Appeal in India) that the agreement created a "partnership" between the respondents within the definition in section 239 of the Contract Act (IX of 1872) which governed the case. But it was a partnership of a limited character, and consequently liability to be enforced against one partner, when there was no document of debt which on its face bound him, could only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

On the terms of the agreement the purchase of the sugar under it became a purchase for the partnership, and anyone who sold the sugar or advanced money by which the sugar was bought was crediting the partnership with goods or money. If either party in the case bought sugar and then re-sold it under the provision in the agreement for re-sale in Mauritius he could not refuse his co-adventurer a share of the profit he made. The joint adventure began not when the goods were shipped, but from the moment the sugar was bought. The appellant too was acquainted with the whole terms and conditions of the agreement, and knew therefore that by advance of credit he was helping the partnership in its purchase of sugar. That credit was not given in the precise way contemplated by the agreement; but that the respondents availed themselves of the appellant's credit appeared on the hundis themselves. When a drawer discounts an acceptance which is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit. Moreover on the evidence of the first respondent himself in cross-examination "the sugar purchased was all paid for by the hundis accepted by the appellant."

As to the criterion to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction, the cases of *Gouthwaite v. Duskworth* (1810) 12 East 421 at p. 426; *Saville v. Robertson* (1792) 4 T. R. 720; and *Heap v. Dobson* (1863) 15 C. B. N. S. 460 in the English Courts; and *Cunningham v. Kinnear* (1765) 2 Pat. App. Cas. 114; *British Linen Company v. Alexander* (1853) 15 D. 277; and *White v. McIntyre* (1841) 3 D. 334 in the Scottish Courts; and Bell's Commentaries on the Principles of Mercantile Jurisprudence, section 395, were referred to.

KARMALI ABDULLA v. KARIMJI JIWANJI

.. (1914) 39 Bom. 261

PENAL CODE (ACT XLV OF 1860), SEC. 75—*Relevancy of previous conviction for the purpose of determining extent of sentence*

See PRACTICE

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PENAL CODE (ACT XLV OF 1860), SECS. 337, 338—*Hurt caused by rashness or negligence—Hakim—Performance of eye-operation with ordinary scissors—Neglect of ordinary precautions—Partial loss of eye-sight.*] The accused, a Hakim, performed an operation with an ordinary pair of scissors, on the outer side of the upper lid of the complainant's right eye. The operation was needless and performed in a primitive way, the most ordinary precautions being entirely neglected. The wound was sutured with an ordinary thread. The result was that the complainant's eye-sight was permanently damaged to a certain extent. The accused was on these facts convicted of an offence punishable under section 338 of the Indian Penal Code. He having applied to the High Court:—

Held, that the accused had acted rashly and negligently so as to endanger human life or the personal safety of others.

Held, also, that the act of the accused amounted to an offence punishable under section 337 of the Indian Penal Code, since there was no permanent privation of the sight of either eye in consequence of the operation.

Where a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law.

EMPEROR v. GULAM HYDER PUNJABI

.. (1915) 39 Bom. 523

PENSIONS ACT (XXIII OF 1871), SEC. 6—*Saranjam—Grant of land revenue—Suit to recover—Collector's certificate—Admission of pleader binding on client—Preliminary decree—Appeal—Remand—Civil Procedure Code (Act V of 1908) Order XLI, Rule 23.*] The grantee of a Saranjam filed a suit for the recovery thereof and at the trial a preliminary issue was raised as to the maintainability of the suit without the certificate provided for by section 6 of the Pensions Act. The grantee's pleader admitted a certificate was necessary but after several adjournments for the purpose failed to produce a certificate. A decree was thereupon passed on the preliminary issue dismissing the suit. On appeal by the grantee it was contended that he was not bound by the admission of the pleader and it was stated that such evidence could be produced as would render a certificate unnecessary.

Held, that the grantee was bound by the admission of his pleader and that even if he was not so bound there was no material before the Court to justify a reversal of the decree and therefore a remand under Order XLI, Rule 23 of the Civil Procedure Code (Act V of 1908) was impossible.

In the absence of evidence to the contrary, the grant of a Saranjam must be presumed to be a grant of land revenue and not of the soil.

Ramchandra v. Venkatrao (1832) 6 Bom 598 and *Raja Bommilvara Venkata Narasimha Naidu v. Raja Bommadevara Bhashyakarlu Naidu* (1902) L. R. 29 I. A. 76, referred to.

DATTAJIRAO GHORPADE v. NILKANTRAO

... (1914) 39 Bom. 362

PETITION—*Creditor's petition for compulsory winding-up of company—Company's inability to pay its debts.*

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<i>Previous conviction—Relevancy of previous conviction for the purpose of determining extent of sentence—Indian Penal Code (Act XLV of 1860), sec. 75—Indian Evidence Act (I of 1872), secs. 54, 165.] The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced after the accused is found guilty, as an element to be taken into consideration in awarding punishment.</i>	
<i>Per SHAH, J.:—The proof of a previous conviction not contemplated by section 75 of the Indian Penal Code may be adduced provided the previous conviction is relevant under the Indian Evidence Act. The whole question, therefore, is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of section 562 of the Code of Criminal Procedure would apply to this case, and it seems to me to be otherwise relevant on the question of punishment.</i>	
EMPEROR v. ISMAIL ALI BHAI	[... (1914) 39 Bom.326]
PRELIMINARY DECREE— <i>Appeal.</i>	
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PRELIMINARY DECREE—*Decision that suit not barred as caste question is not preliminary decree.*

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—*Finding on a preliminary issue whether a party is an agriculturist—In what cases is the finding a preliminary decree.*

See **CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 2, 97** ... 422

—*Finding that a suit is not res judicata.] A decision that a matter is not res judicata is not a preliminary decree.*

Channalswami v. Gangadharappa (1914) 39 Bom. 339, followed.

BHARMA BIN SHIDAPPA v. BHAMAGAYDA ... (1914) 39 Bom. 421

PREVIOUS CONVICTION—*Relevancy for the purpose of determining extent of sentence.*

See **PRACTICE.** ... 326

PRINCIPAL AND SURETY—*Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time.*

See **CONTRACT ACT (IX OF 1872), SECS. 134, 137** ... 52

PROBATE—*Joint Hindu family—Ancestral property—Will—Payment of full probate duty.] In a case where there was admittedly a joint Hindu family consisting of a father and a minor son, the father made a will in effect bequeathing the whole property to his minor son. It was not disputed that the property covered by the will was joint family property. The executors contended that the deceased testator had no beneficial interest in any part of the property devised, and therefore they were exempted from the payment of any probate duty :—*

Held, that where the matter in question was probate, the parties claiming under the will could not go behind its terms, or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the will itself, but with the express statements made therein and that the executors must pay full probate duty upon the will.

Collector of Kaira v. Chunilal (1904) 29 Bom. 161, distinguished.

KASHINATH PARSHARAM v. GOURAVABAI ... (1914) 39 Bom. 245

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See **DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SECS. 13, 15D AND 16** ... 73

—*SUIT ON—Plea of an oral agreement purporting to vary note—Admission in pleadings—Admission subject to condition—Absence of substantive proof of oral agreement—Onus of proof.*

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PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART.

13—*Revenue Jurisdiction Act (Act X of 1876), section 5, clause (c)—Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Suit by an Inamdar against a Khatedar for recovery of sums—Dues—Suit not cognizable by a Small Cause Court—Set-off claimed in a capacity different from that in suit, not allowable.] Sums payable by a Khatedar to an Inamdar as superior holder are dues and a suit to recover such dues, though less than Rs. 500, is not cognizable by a Court of Small Causes and a decree passed in such suit is subject to a second appeal.*

In a suit brought by an Inamdar against a Khatedar for the recovery of dues in respect of certain immovable property payable by the Khatedar, the defendant, as a *pujari* (worshipper), claimed to set off the stipend payable to him by the plaintiff.

Held, that the defendant could not claim the set-off which was due to him in a different capacity from that in which he held as tenant or Khatedar of the plaintiff.

MADHAVRAO MORESHVAR v. RAMA KALU

...(1914) 39 Bom. 131

RAILWAY—Indian Contract Act (IX of 1872), secs. 151 and 152—Liability of Railway Companies for loss, damage or destruction of goods entrusted to them for carriage—Evidence necessary to exonerate Railway Company when the true cause of the loss, &c., cannot be ascertained—Provision of appliances to put out fires.] H. sued the B. B. & C. I. Railway Company for the value of certain bales of cotton entrusted to the railway company for carriage and accidentally burnt while being so carried.

Held, that the railway company, merely by getting the Court to believe that the wagon on which the goods entrusted to it had been loaded had been so loaded with ordinary care, had not done all that was needed to absolve itself, but that in the absence of a definite known cause the railway company had to satisfy the Court that in the management of its engines, and in the whole course of drawing the wagon to the place where it caught fire, the railway company observed in all respects the same degree of care and prudence which an ordinary man conveying his own valuable goods might have been expected to take under the same circumstances.

When anyone has entrusted goods to a railway company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the railway company, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Indian Contract Act but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus.

Lakhichand Ramchand v. G. I. P. Railway Company (1911). 37 Bom. 1 is an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of the loss. The company as bailee is primarily liable for the loss, but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the railway company's control. Second, the bailee, while ignorant of the *vera causa*, might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. But such a defence could only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

HIRJI KHETSEY & COMPANY v. B. B. & C. I. RAILWAY COMPANY

...
(1914) 39 Bom. 191

RAILWAY RECEIPT—Delivery of goods to be carried by railway—Issue of railway receipt not necessary to complete the delivery.

See RAILWAYS ACT, INDIAN (IX OF 1890), SEC. 73

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RAILWAY RULE—*Rule 2 made under section 47, sub-section (1), clause (f) of Railways Act (IX of 1890) is ultra vires.*

See RAILWAYS ACT, INDIAN (IX OF 1890), SEC. 72

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RAILWAYS ACT, INDIAN (IX OF 1890), SEC. 72—*Rule 2 made under section 47, subsection (1), clause (f)—Rule not valid—Delivery of goods to be carried by Railway administration—Grant of railway receipt not essential to complete delivery.* The plaintiffs brought certain goods to the railway premises and handed a consignment note to the clerk of the Railway Company. No receipt was given as the goods were not weighed and loaded. In the meanwhile, a fire broke out on the premises and destroyed the goods. The plaintiffs having sued the Railway Company for the loss of goods, the lower Court held that the company was not liable for the loss in absence of a railway receipt, as provided for in Rule 2 framed under section 47, sub-section (1), clause (f) of the Indian Railways Act (IX of 1890). On plaintiffs' application under Extraordinary Jurisdiction:—

Held, that the commencement of the liability of the Company for goods delivered to be carried under section 72 was in no way dependent upon the fact of a receipt having been granted, but must be determined on evidence quite independently of Rule 2 under section 47, sub-section (1), clause (f) of the Indian Railways Act (IX of 1890).

Held, also, that inasmuch as Rule 2 sought to define and by defining changed what would otherwise be the meaning of section 72 of the Act the rule was bad.

Per HEATON, J.:—"A 'delivery to be carried by railway' (within the meaning of section 72 of the Indian Railways Act, 1890) means something more than a mere depositing of goods on the railway premises: it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case; but it certainly may be completed before a railway receipt is granted."

Per SHAH, J.:—"The delivery contemplated by section 73 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of carrying the same by railway. Such acceptance may be expressed or implied in a variety of ways by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend upon the circumstances of each case and the usual course of business of the railway administration as to whether the goods can be said to be delivered to be carried by railway under section 72 of the Act."

RAMCHANDRA NATHA v. G. I. P. RAILWAY COMPANY

... (1915) 39 Bom. 485

RECORD OF RIGHTS—*Enquiry by Mamlatdar—Mamlatdar's Court is Revenue Court.*

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Mortgage-deed—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and

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————— <i>Resumption for "public purposes" by Government of land granted by East India Company—Scheme to erect dwelling houses at adequate rent for the accommodation of Government Officials in Bombay—Construction of lease and Sanad—English decision under 43 Eliz., c. 2 as to exemption from rating—Notice of resumption addressed to one party and served on another—Waiver.] In these appeals the Judicial Committee held (affirming the decisions of the Courts in India) that the providing of housing accommodation for Government Officials by the erection of dwelling houses for their private residences at adequate rents, was a "public purpose" within the meaning of a lease of land from the East India Company given in 1854, and a Sanad or Government Permit of land granted in 1839 by the same Company, which made such lands (situate on Malabar Hill, Bombay) liable to resumption for "public purposes" upon certain terms as to notice and compensation. The scheme was one which their Lordships agreed with the Courts below would under the circumstances in evidence redound to public benefit by helping the Government to maintain the efficiency of its servants.</i>	

Held also (agreeing with the Courts below) that the English decisions which construed the words "public purposes" as used in the Statute 43, Eliz., c. 2 with reference to exemptions from rating afforded no help as to the proper construction to be put on the words in the contracts in suit.

The definition of a "public purpose" that "the phrase, whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned," approved by their Lordships of the Judicial Committee.

A notice which though addressed to one of the defendants (a testator who was dead) was served on one of his executors and trustees, also a defendant, and accepted and acknowledged by his solicitors who corresponded on the basis of it with the Government as to the resumption, was held to be a valid notice, the irregularity having been thereby waived.

HAMABAI FRAMJEE v. SECRETARY OF STATE FOR INDIA	... (1914) 39 Bom. 279
REVENUE JURISDICTION ACT (ACT X OF 1876), SEC. 5, CL. (c)— <i>Suit by an Inamdar against a Khatedar for recovery of sums—Dues—Suit not cognizable by a Small Cause Court.</i>	
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SMALL CAUSE COURT— <i>Suit by an Inamdar against a Khatedar for recovery of sums not cognizable.</i>	
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SPECIFIC RELIEF ACT (I OF 1877), SEC. 38— <i>Covenant in the mortgage-deed—Mortgage and rent-note void—Claim for compensation based on covenant maintainable.</i>	
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—————SEC. 39—*Indian Evidence Act (I of 1872), sec. 52—Civil Procedure Code (Act V of 1908), sec. 100, Order VI, Rule 6—Suit to set aside a sale-deed—Specific allegations of coercion made in the plaint—Allegations disbelieved—Different kind of coercion held probable on other circumstances and doubts—Finding not secundum allegata et probata—Substantial error in procedure—Ground for setting aside what might otherwise be a conclusion of fact.]* Plaintiff sued the defendant to set aside a sale-deed on the ground of coercion of a particular kind under section 39 of the Specific Relief Act (I of 1877). Both the lower Courts disbelieved the allegations of coercion made in the plaint, but granted relief to the plaintiff on the ground that on a consideration of other circumstances the plaintiff must have been deceitfully decoyed into going quietly and privately to the defendant's *mandap* (open shed) and there through fear of possible violence made to sign the document.

On second appeal by the defendant,

Held, reversing the decree and dismissing the suit, that a suspicion of some kind or other undefined coercion was not sufficient to support the plea of coercion, the plea being not *secundum allegata et probata*.

Motee Lall Opudhiya v. Juggurnath Gurg (1836) 5 W. R., P. C. 25,
Eshenchunder Singh v. Shamachurn Bhutto (1866) 11 Moo. I. A. 7 and
Balaji v. Gangadhar (1908) 32 Bom. 255, referred to.

Per Hayward, J.—Where fraud or coercion are alleged, detailed particulars must be given in the pleadings and parties must be strictly confined to that state of facts.

Where particulars of coercion alleged are wholly rejected and evidence disbelieved, and a vague and different kind of coercion is held to have been probable on other circumstances and doubts, there is a substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law.

Per Beaman, J.—A plaintiff who comes to Court alleging fraud or coercion in respect of which the law requires him to give particulars and he being disbelieved upon every material one of them cannot be given relief.

When a finding is absolutely unsupported by any evidence at all, that is a ground for setting aside what might otherwise be a conclusion of fact.

When the Court has found a case required to be made by the plaintiff not proved and has found another case unsupported in its most essential point by any evidence at all, proved, and so substituted the latter for the former, there is a substantial error in procedure under section 100 of the Civil Procedure Code (Act V of 1908).

PURUSHOTTAM DAJI v. PANDURANG CHINTAMAN

...(1914) 39 Bom. 149

STAMP ACT (II OF 1899), SEC. 59, SCH. I. ART. 35, CL. (a), SUB. CL. (iii)—

Lease—Lessee agreeing to pay annual rent plus Government assessment—Whether rent includes assessment for purposes of stamp duty. A piece of land was leased for five years whereby the lessee agreed to pay to the lessor Rs. 100 as rent plus Rs. 16-8-0 on account of Government assessment. The question being referred whether the stamp duty should be levied on Rs. 100 or Rs. 116-8-0 the total amount of rent and Government assessment,

Held, that the Government assessment did not form part of the profit and therefore the stamp duty was leviable only on Rs. 100 the annual rent, under Schedule I, Article 35, clause (a), sub-clause (iii) of Stamp Act.

GANGARAM NARAYANDAS TELI, *In re*

...(1915) 39 Bom. 434

STATUTE, CONSTRUCTION OF—The express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts.

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<i>Held</i> , that the sale of 1906 could not be avoided, under section 53 of the Transfer of Property Act (IV of 1882), at the option of the defendant, who was not a creditor of the vendor, or a subsequent transferee or a person having an interest in the property, within the meaning of the section.	
<i>Having regard to the preamble as well as section 5 of the Transfer of Property Act (IV of 1882), a person who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53 of the Act.</i>	
A person having an interest in the property within the meaning of section 53 means the person who has such interest at the time of the transfer objected to.	
VASUDEO RAGHUNATH v. JANARDHAN SADASHIV	... (1915) 39 Bom. 507
—SEC. 54.— <i>Sale—Agreement to reconvey—No bar to recovery of possession—Construction of statute.</i> [An agreement by the plaintiff to reconvey the property to the defendant made contemporaneously with the sale-deed cannot be pleaded in bar of plaintiff's right to recover possession under the deed of sale.	

The provisions of section 54 of the Transfer of Property Act are imperative.

The express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts.

Kurri Veerareddi v. Kurri Bapireddi (1906) 29 Mad. 336, followed.

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Construction of will of Parsi—Devise to two sons in equal shares—Gift over to son of elder son, if he should have one—Failure of male issue to elder son—Provision for adopted son on failure of natural son—Adoption after testator's death and according to Parsi custom three days after death of father—Gift over to grandson on attaining majority—Elder son surviving testator—Succession Act (X of 1865), sec. 111.] A Parsi having two sons P. and J. made a will in 1866 in the following terms :—Clause 2 stated "The said two sons are proprietors half and half alike and in equal (shares) of my whole estate, outstandings, debts, title and interest, and both the heirs living together are duly to enjoy the balance which may remain after the Sarkar's assessment. In this my testamentary writing I the testator have appointed my two sons as (my) heirs." Clause 5 said that "P. the elder son being in a confused state of mind," the management of the estate was entrusted to the younger son J. "by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole estate with equanimity with my elder son P. in such a way as not to injure his (P.'s) rights. At present my elder son P. has no male issue of his body. (He) has only a daughter. Therefore if my elder son P. gets a male issue half of the estate is to be made over to him on his attaining his full age." Clause 11, after prohibiting any alienation of the property, continued, "If my son P. does not get a son J. is to give away his son as P.'s *palak* (or adopted son). All the clauses of this will are applicable to the said adopted son. If a son be born of the body of P. he (shall) on attaining (his) full age be the owner of a half share of the whole of the immoveable and moveable estate belonging to me . . . all the clauses written in this will are applicable to the said son of (his body)."

The testator died on 21st August 1866 leaving his two sons, and J. entered upon the management of the estate having obtained probate of the will in 1867. P. was twice married but had no son. He died in 1897 leaving a widow and other representatives his heirs according to the Parsi Intestate Succession Act (XXI of 1865) who brought a suit to ascertain the rights and interests of the parties in the estate and for partition, basing their claim on P.'s right as the owner of one-half of the estate from the date of the testator's death. The defendants were J. and his son B. who was five years old at the death of the testator, and who it was alleged had been, though not in the testator's life-time, adopted as the *palak* son of P., and, as the defendants contended, succeeded under the will to the half share of the estate which P. had enjoyed though on the terms of the will it had never vested in P.

Held, (affirming the decisions of the Courts below) that the proper interpretation of the will in the events that had happened was that the date of distribution was the death of the testator, at which date one-half of the estate vested in P. The destination over to a son who should take upon attaining majority would be using language appropriate to the events of the death of P. during the life-time of the testator, and of his having left a son—the situation also being provided for of that son not having at that time attained majority. But when P. himself survived the testator there were no words in the will sufficient to cut down the right of P. to one-half the estate, to a tenancy for life, or a less period therein according to the appellant's contention. On the contrary the words employed appeared suitable to the case of the entire estate being, on the testator's death, divided into two portions, and of each portion then becoming the absolute property of one of the two sons of the testator.

The same result was arrived at by the application of section 111 of the Indian Succession Act which their Lordships agreed with the Courts below was applicable.

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